ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-1102

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SUPREME COURT, U.S.

LOUIE L. WAINWRIGHT,

Petitioner,

vs.

MICHAEL HUTCHINS,

Respondent.

Supreme Court, U.S.
FILED
JAN 31 1984
ALEXANDER L. STEVAS
CLERK

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Respondent restates the questions presented set forth in the petition for writ of certiorari as follows:

Whether a federal district court, upon determining that the substance of a constitutional claim raised in a petition for writ of habeas corpus has been presented to the state courts, albeit without express reliance upon federal constitutional provisions, and that the method of analysis asserted in federal court was readily available to the state courts in passing upon the claim, may properly hold that state remedies have been exhausted under 28 U.S.C. § 2254(b).

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IN THE SUPREME COURT OF THE UNITED STATES

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NO. 83-1102

LOUIE L. WAINWRIGHT,

Petitioner,

vs.

MICHAEL HUTCHINS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

The respondent, Michael Hutchins, files this brief in opposition to the petition for writ of certiorari filed by petitioner in this cause.

STATEMENT OF THE CASE

The facts surrounding respondent's trial and the pertinent state appellate proceedings are accurately set forth in the petition at pages 7-15. Respondent's Statement of the Case will be limited to a recitation of the pertinent federal proceedings.[1]

Respondent's first pro se petition for writ of habeas corpus in the United States District Court for the Southern District of Florida raised four claims: 1) denial of a speedy trial; 2) exclusion of defensive evidence by the state trial court; 3) suppression by the prosecution of favorable evidence; and 4) the

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1 The symbol "P.A." will be utilized to designate petitioner's appendix, and the symbol "R.A." will refer to respondent's appendix.

unconstitutional admission of hearsay testimony (P.A. 21-22). The order of dismissal, entered on September 24, 1979, notes that the court had before it the briefs filed on respondent's direct appeal, the trial transcript, and a response filed by the custodian (P.A. 43). The court noted the four claims raised by respondent, and ruled as follows:

> Hutchins raised the substantial equivalent of numbered issues 2 and 4 on direct [a]ppeal to the Third District Court of Appeal of Florida which [affirmed] his conviction. A subsequent state motion to vacate raised issue 1, the denial of the right to a speedy trial. But Hutchins failed to appeal the denial of the motion to vacate to any state appellate court.
>
> It is evident that although Hutchins has exhausted state remedies as to two of the four issues raised in the petition, he has not exhausted his state remedies as to issue 1, the denial of the right to a speedy trial, nor issue number 3, the failure of the prosecution to disclose evidence favorable to the defendant. (P.A. 44-45; citation omitted).

Relying upon the rule that "state remedies must be exhausted as to all issues raised in a federal habeas corpus petition" prior to federal consideration of a prisoner's claims, the court dismissed the petition without prejudice for further exhaustion of state remedies (P.A. 45-46).

Respondent did not initiate further state-court proceedings (P.A. 22). On March 2, 1982, he filed his second pro se petition, raising three claims: 1) the exclusion of defensive evidence by the state trial court; 2) the unconstitutional admission of hearsay testimony; and 3) the suppression by the prosecution of favorable evidence (P.A. 22-23). The petitioner moved to dismiss the petition for failure to fully exhaust state remedies (P.A. 23; R.A. 1-6). In the motion, petitioner conceded that respondent had "rais[ed] the [substantial] equivalent of two of the four grounds which he presently raises in this federal habeas corpus petition, that is, ground (1), the exclusion of a [defense] witness . . . and ground (2), the admission of hearsay evidence at his trial", but asserted that respondent had failed to present his suppression claim to the state courts (R.A. 2-3). Respondent accordingly contended that "[o]f these three grounds, only two (grounds 1 and 2) have been presented to both

the state trial and appellate courts which have considered and rejected them", and that the petition should be dismissed for exhaustion of state remedies as to all claims in the petition (R.A. 3). Petitioner also requested the court to compel respondent to state his intentions regarding the speedy-trial claim which had been raised in the first petition, but not in the second (R.A. 4-5).

The District Court thereafter permitted respondent's state-appointed appellate counsel to appear on his behalf (R.A. 7, 65; see P.A. 122-23). The court directed counsel to file a statement "of those grounds upon which Petitioner seeks to proceed or which he waives or discards", and granted leave to file a supporting memorandum (R.A. 7). On October 21, 1982, counsel for respondent filed the required announcement, advising the court that respondent was abandoning all claims except for the two questions properly before the court, i.e., the exclusion of defensive evidence and the admission of hearsay testimony, and also filed a supporting memorandum of law on those claims (R.A. 8-10; P.A. 23-24). On October 25, 1982, the court issued an order providing that the case would proceed solely on the two exhausted claims, and permitting petitioner to file a responsive memorandum "[o]n these questions" (R.A. 11).

On November 22, 1982, petitioner filed a memorandum of law which asserted in part that the confrontation claim had not been presented to the state appellate court, in that appellate counsel "never once couched the claim in terms of a violation of the Confrontation Clause." (R.A. 17). Petitioner urged that "his previous concession that the Confrontation Clause claim had been exhausted was erroneous" (R.A. 21), and contended that respondent should be found to have waived his right to habeas corpus review of this claim or, in the alternative, to have failed to fully exhaust his state remedies (R.A. 18-21).

At oral argument before the magistrate on November 29, 1982, counsel for respondent asserted that the substantial equivalent of the confrontation claim had been presented to the state appellate court on direct appeal, and further that petitioner was

barred from raising a waiver or exhaustion objection, both by the previous order of the district court finding that the claim had been exhausted, and by his failure to have promptly litigated the issue (R.A. 24-35).[2] In its order, the court held that respondent was entitled to relief on the confrontation claim and rejected petitioner's procedural arguments (A. 47-86).[3]

The court found that petitioner had "failed to present an acceptable or justifiable excuse for its failure to previously assert these procedural claims." (P.A. 56-57). The court held that the prior dismissal order constituted "a final judicial determination that the substantial equivalent of the present confrontation claim" had been presented to the state courts, barring relitigation of the issue, and further ruled that petitioner's failure to raise his objections until after respondent "had justifiably and detrimentally relied" upon petitioner's concession that the claim had been exhausted "both equitably estops [petitioner] from raising his procedural defense, and constitutes a waiver." (P.A. 58-59; citations omitted).

The court also held that "the substantial equivalent of the confrontation claim was presented to the state courts, both at trial and on appeal." (P.A. 59-60). With regard to the presentation of the issue on direct state appeal, the court noted the phrasing of the issue, and held as follows:

> I find that the substance of the present claim was presented to the state courts by petitioner. . . . The essence of the claim is that the prosecution obtained an unfair advantage by effectively introducing into evidence the out-of-court statements of the

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2 At oral argument before the magistrate, counsel for petitioner explained the failure to previously assert these objections as follows:

> . . . I first got this case -- I don't mean to claim ignorance -- but I had just started with this office, to be honest with Your Honor, I had maybe an erroneous concession that [it] had been exhausted. (R.A. 43).

3 Since the District Court adopted the magistrate's recommendation in its final order granting relief (P.A. 37-38), the report will be referred to as the order of the court.

> unidentified informant as ostensible non-hearsay, and then relying upon those statements as evidence of Petitioner's guilt. This is precisely what the Confrontation Clause is designed to prohibit. (P.A. 61-62).

On appeal to the United States Court of Appeals for the Eleventh Circuit, petitioner asserted that "the district court's order in the first petition was not a final order that would be res judicata and preclude [petitioner] from raising the procedural issues", that the court had erred in finding that his conduct in the subject litigation constituted a waiver of his procedural claims, and that the substantial equivalent of the confrontation claim had not been presented to the state courts (R.A. 70-84).[4] In contending that the substantial equivalent of the federal claim had not been presented to the state court on direct appeal, petitioner urged the following standard upon the Court of Appeals:

> . . . [A] federal habeas petitioner is required to have provided [the] state courts with a "fair opportunity" to apply controlling legal principles to the facts bearing upon his constitutional claim. Furthermore, the habeas petitioner must have "fairly presented" to the state courts the "substance" of his federal habeas corpus claim. It is not enough that all facts necessary to support the federal claim were before the state courts or that a somewhat similar state law claim was made. The argument raised in federal court must be the substantial equivalent of that presented to the state courts "to insure that the 'method of analysis' was readily available to the state court." (R.A. 82; citations omitted).

The Court of Appeals, while noting that the wording in respondent's state appellate brief had been "inartful" (P.A. 34), held that the substantial equivalent of the confrontation claim had been presented to the state courts:

> . . . Although the phrasing of the issue on direct appeal did not use the words "confrontation clause," the appeal clearly

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Counsel for petitioner, in oral argument before the Court of Appeals, abandoned the claim that the court's prior order, finding that the confrontation claim had been exhausted, was not a final order. On the merits of respondent's claim, petitioner's only argument on appeal was that the confrontation error had been harmless (P.A. 90-91). No issue is presented in his petition as to the holding of the Court of Appeals that the error was prejudicial.

> presented the problem of allowing and urging the jury to infer that an unnamed non-testifying witness had identified the petitioner. The fifth circuit has held that objection on hearsay grounds is sufficient to present a state court with a subsequently raised federal constitution confrontation clause claim. [citation omitted]. The applicable law requires that a habeas corpus petitioner present "the substance of a federal habeas corpus claim" to the state courts. [citation omitted]. However, it is not required that the petitioner present book and verse on the federal constitution. [citation omitted]. We are mindful of respondent's citation to Anderson v. Harless, ___U.S.___, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982), for the proposition that the petitioner must couch his claim so as to allow a state court to rule on any applicable constitutional grounds. The Court in Harless, however, still focused on the premise that it is the substance of the claim that the court looks to in analyzing whether a federal claim has been voiced.
>
> We conclude that the issue, as presented on direct appeal, albeit obliquely, did sufficiently alert the state court to a confrontation issue. The substance of petitioner's claim was that the prosecution obtained an unfair advantage by effectively introducing into evidence the out-of-court statements of the unidentified informant. The prosecution then relied upon these statements as evidence of the petitioner's guilt. This is exactly what the confrontation clause is designed to prohibit. [citations omitted]. (P.A. 28-31).

REASONS FOR DENYING THE WRIT

THE DECISION OF THE COURT OF APPEALS, HOLDING THAT PETITIONER HAD EXHAUSTED HIS STATE REMEDIES, IS BASED UPON AN APPLICATION OF THE STANDARDS ENUNCIATED BY THIS COURT FOR DETERMINING WHETHER A HABEAS CORPUS PETITIONER HAS PRESENTED THE SUBSTANCE OF A FEDERAL CONSTITUTIONAL CLAIM TO THE STATE COURTS PRIOR TO INVOKING 28 U.S.C. § 2254.

The controlling standard in the Eleventh Circuit for determining if a constitutional claim raised in a habeas corpus petition brought by a state prisoner has been sufficiently presented to the state courts to satisfy the exhaustion requirement of 28 U.S.C. § 2254(b) is as follows:

> . . . A habeas petitioner need not spell out each syllable of his claim before the state courts in order to satisfy the exhaustion requirement of § 2254(b). It suffices that the substantial equivalent of a petitioner's federal habeas claim has been argued in the state proceedings. Lamberti v. Wainwright, 513 F.2d 277, 282 (5th Cir. 1975).

Accord Speigel v. Sandstrom, 637 F.2d 405, 407 (5th Cir. 1981).[5]

This standard does not require, as an essential prerequisite to a finding of exhaustion, that a petitioner have expressly relied upon federal constitutional provisions or authority in state court proceedings, in accordance with the rule of Picard v. Conner, 404 U.S. 270 (1971):

> We emphasize that the federal claim must be fairly presented to the state courts. . . . Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts.
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> * * *
>
> . . . Obviously there are instances in which "the ultimate question for disposition," will be the same despite variations in the legal theory or factual allegations urged in its support. . . . Hence, we do not imply that respondent could have raised [his] claim only by citing "book and verse on the federal constitution." We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts. . . . Id. at 275-78 (citations omitted).

Picard commands that a habeas petitioner "must have 'fairly presented' to the state courts the 'substance' of his federal habeas corpus claim." Anderson v. Harless, ___U.S.___, 103 S.Ct. 276, 277 (1982)(citations omitted).

Petitioner does not--and, indeed, could not--assert that the Eleventh Circuit standard stated above runs afoul of the Picard rule. Rather, petitioner contends that the interpretation of that standard in the present case constitutes an "abrogation" of Picard and Harless. Petition for Writ of Certiorari (hereinafter referred to as "Petition") at 34.[6] The lack of merit to this

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5 See Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981)(adopting former Fifth Circuit precedent decided prior to October 1, 1981).

6 In both the District Court and the Court of Appeals, petitioner litigated his contention that respondent had failed to properly present his confrontation claim to the state courts primarily as a waiver argument under Wainwright v. Sykes, 433 U.S. 72, 87 (1977), and Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 1572 (1982)(R.A. 18-21, 85). The basis of petitioner's argument was that Florida law prohibits respondent from (Cont.)

contention is affirmatively established on the face of the court's opinion.

The Court of Appeals expressly noted the Picard rule that the "'substance of a federal habeas corpus claim'" must first be presented to the state courts, and the holding in Harless that a petitioner "must couch his claim so as to allow a state court to rule on any applicable constitutional grounds." (P.A. 28-29; citations omitted). The ultimate conclusion of the court was that the state appeal "clearly presented the problem of allowing and urging the jury to infer that an unnamed non-testifying witness had identified the petitioner" and, accordingly, that "[t]he substance of petitioner's claim" was presented to the

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relitigating his claim in post-conviction proceedings, and that the procedural-default rule of Sykes and Isaac therefore bars respondent from litigating the claim on habeas corpus (R.A. 18-19, 86). Florida law does provide that post-conviction remedies under Rule 3.850 of the Florida Rules of Criminal Procedure are unavailable for review of issues which could have been asserted on direct appeal, see, e.g., Adams v. State, 380 So.2d 423 (Fla. 1980), and respondent's state remedies are accordingly deemed to have been "exhausted", regardless of whether he sufficiently presented the confrontation claim to the state courts. Engle v. Isaac, supra at 1570 n.28.

In attempting to recast his argument under the exhaustion doctrine, petitioner now asserts that respondent is "possibly" precluded from litigating his claim under the state post-conviction rule, but is not precluded from presenting it "in a petition for writ of habeas corpus in the state appellate court alleging ineffective assistance of appellate counsel." Petition at 47 n.22. However, while Florida law does permit challenges to the effectiveness of appellate counsel on the ground that counsel failed to raise meritorious issues on appeal, see, e.g., Knight v. State, 394 So.2d 997 (Fla. 1981), the Supreme Court of Florida has recently noted that this remedy is collateral in nature, and that "[a]llegations of ineffective appellate counsel therefore should not be allowed to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal." McCrae v. Wainwright, 439 So.2d 868, 870 (Fla. 1983). Since petitioner would not be entitled to the same consideration of his claim on state habeas corpus as he would on direct appeal, that collateral remedy is not "available" within the meaning of 28 U.S.C. § 2254(c). Engle v. Isaac, supra at 1572 n.28.

The issue in this case is thus waiver, not exhaustion; in any event, it was so litigated in the Court of Appeals. Therefore, even if petitioner had prevailed in that court on the claim raised in his petition, a remand for further litigation on cause and prejudice under the Sykes-Isaac rule would have been necessary. Controlling precedent in the Eleventh Circuit requires that the initial determination of cause must be made in the district court, see e.g., Huffman v. Wainwright, 651 F.2d 347, 352 (5th Cir. 1981), and provides that if a district court has erroneously ruled that no procedural default occurred in state court, the petitioner must be given an opportunity to litigate cause and prejudice before the district court prior to a final determination of his petition. Clark v. Wainwright, 701 F.2d 895, 897 (11th Cir. 1983).

state court (P.A. 30-31; emphasis supplied).[7] The focus of the court upon the "substance" of petitioner's state-court argument is in complete accord with the commands of Picard, and the court correctly characterized the holding of this Court in Harless, which similarly compels consideration of the "substance" of state-court claims. 103 S.Ct. at 277.

Petitioner discusses at some length the approaches which have been adopted by the courts of appeals in addressing cases which present Picard problems, and notes some minor linguistic

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This interpretation of the Picard rule, which centers on whether the same "method of analysis" necessary to determine the constitutional claim was available to the state court, see, e.g., Bisaccia v. Attorney General of State of New Jersey, 623 F.2d 307, 311-12 (3d Cir. 1980), cert. denied, 449 U.S. 1042 (1980); Zicarelli v. Gray, 543 F.2d 466, 472 (3d Cir. 1976), was specifically urged upon the court below by petitioner, who argued that Picard requires that "[t]he argument raised in federal court must be the substantial equivalent of that presented to the state courts 'to insure that the "method of analysis" was readily available to the state court.'" (R.A. 82; citation omitted). Petitioner's failure to assert that Picard mandates a stricter standard should bar it from so claiming before this Court. See, e.g., United States v. Ortiz, 422 U.S. 891, 898 (1975)(argument not raised in court of appeals will not be considered on certiorari).

It should also be noted that no jurisdictional claim is or could be presented as to the application of that standard in this case, i.e., with regard to the court's holding that the substantial equivalent of respondent's claim was actually presented to the state courts. Petitioner's argument on the application of the standard does not assert a conflict of decisions or other basis for issuance of the writ, but is simply a restatement of the arguments on the merits which the district court and court of appeals have rejected. Petition at 38-47.

Moreover, even if there were any merit to petitioner's substantive contentions, they are foreclosed by the ruling of the district court in the prior habeas proceeding. As is set forth in the Statement of the Case, the district court specifically determined, in the first habeas proceeding brought by respondent, that the substantial equivalent of the confrontation claim had been raised in the state courts (P.A. 44-45). In this proceeding, the district court found that its prior order was res judicata on this question (P.A. 58). Petitioner's only challenge to this finding on appeal was that the previous order had not been final (R.A. 70-73), an argument which he abandoned in oral argument before the court of appeals. With the finality of the order conceded, the fundamental rule that it is binding "'not only as to every matter which was offered and received to sustain or defeat to claim or demand, but as to any other admissible matter which might have been offered for that purpose'" applies. Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597 (1948)(citations omitted).

The holding of the court below that the substantial equivalent of the confrontation claim had been presented to the state courts pretermitted any need to address this issue. Nonetheless--and particularly in light of petitioner's agreement that the prior order was final--the result in this case would have been the same regardless of the substantive merit of the court's ultimate conclusion.

differences among their decisions. Petition at 27-34. However, petitioner does not assert a conflict between the decision in this case and other federal appellate decisions as a basis for invoking this Court's certiorari jurisdiction, and none exists; regardless of the language used in interpreting Picard, the courts of appeals uniformly adhere to the principle that the "substance", rather than the form, of a federal constitutional claim must have been presented to the state courts. See, e.g., Nelson v. Solem, 714 F.2d 57, 59-60 (8th Cir. 1983); United States ex rel. Nance v. Fairman, 707 F.2d 936, 940-41 (7th Cir. 1983); Daye v. Attorney General of State of New York, 696 F.2d 186, 194 (2d Cir. 1982); Williams v. Holbrook, 691 F.2d 3, 6-7 (1st Cir. 1982). The determination by the court of appeals in the present case that respondent's litigation of his federal claim in the state courts sufficiently set forth the substance of his claim and required the same method of analysis as required for disposition of that claim is not out of harmony with these precedents, and, more importantly, is completely consistent with the controlling pronouncements of this Court.

CONCLUSION

Based upon the foregoing, respondent requests this Court to deny the petition for writ of certiorari in this cause.

Respectfully submitted,

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LOUIE L. WAINWRIGHT,

Petitioner,

vs.

MICHAEL HUTCHINS,

Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari, Motion for Leave to Proceed in Forma Pauperis, and Notice of Appearance have been served upon PENNY H. BRILL, Assistant Attorney General, 401 N.W. Second Avenue, Suite 820, Miami, Florida 33128, counsel for petitioner, by depositing same in the United States mail, first class mail, postage prepaid, this 20TH day of January, 1984, and that all parties required to be served have been served this date.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-1102

LOUIE L. WAINWRIGHT,

Petitioner,

vs.

MICHAEL HUTCHINS,

Respondent.

NOTICE OF APPEARANCE

The undersigned hereby enter their appearance as counsel for the respondent, Michael Hutchins, in the above-styled cause.

Respectfully submitted,

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APPENDIX TO BRIEF OF
RESPONDENT IN OPPOSITION

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-0420-Civ-JE

MICHAEL HUTCHINS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

MOTION TO DISMISS AND/OR EXTENSION OF TIME AND MEMORANDUM OF LAW

FILED

Respondent, STATE OF FLORIDA, by and through its undersigned counsel, files this Motion to Dismiss and/or Extension of Time and Memorandum of Law in response to this Court's order to Show Cause dated May 11, 1982, and states as follows:

I

PROCEDURAL HISTORY

1. Respondent is filing with this Memorandum the transcript of the trial, record on appeal, and the assignments of error and Petitioner's brief, filed in the District Court of Appeal of Florida, Third District, on Petitioner's direct appeal from his conviction and sentence. The symbol "R" will be used for reference to this record on appeal. Respondent is also filing with this memorandum various documentary exhibits which will be referred to by their corresponding letter designation.

2. Petitioner is presently in the custody of Louis L. Wainwright, Secretary, Department of Offender Rehabilitation of the State of Florida (who should be substituted and added as the proper party respondent in this action), pursuant to a valid judgment of guilty entered by the Circuit Court of Dade County, Florida, Criminal Division, Case No. 75-7951. The Petitioner, after a trial by jury, was convicted of robbery and an assault with intent to commit second degree murder. (R.259). The transcript of the trial and the record on appeal are attached as Exhibit "F". Petitioner was sentenced to a term of twenty (20) years imprisonment on the robbery conviction, and to a term of ten (10) years imprisonment in the

state penitentiary on the assault conviction, this latter sentence to run consecutively with the sentence imposed for robbery. (R.261).

3. Petitioner appealed his conviction to the District Court of Appeal, Third District, raising the subsequent equivalent of two of the four grounds which he presently raises in this federal habeas corpus petition, that is, ground (1), the exclusion of a defesne witness on the basis that his testimony was irrelevant, and ground (2), the admission of hearsay evidence at his trial. (See Petition at 4-5; see, Exhibit "A", Points I and II on Appeal in Petitioner's brief on direct appeal and Exhibit "B", Respondent's brief on direct appeal). The Petitioner was represented by counsel on his direct appeal. The District Court of Appeal, per curiam affirmed the Petitioner's conviction, without an opinion. Hutchins v. State, 349 So.2d 1237 (Fla. 3d DCA 1977).

4. Subsequently, Petitioner filed a Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. §2254, in the United States District Court, Southern District of Florida, Case No. 78-3264-Civ-NCR. (Exhibit "C"). In said petition, Petitioner raised four grounds, (1) the denial of the right to a speedy trial, (2) the conviction was obtained by the unconstitutional failure of the court to disclose evidence favorable to the defendant, and (4) the conviction was obtained by the court's unconstitutional act of letting hearsay evidence in, which was only favorable to the prosecution. (See Exhibit "C", Petition in Case No. 78-3264-Civ-NCR, at 4-5). The Petition was dismissed by the District Court for failure to exhaust state remedies for two of the grounds asserted (grounds (1) and (3)). (See Exhibit "D"). The dismissal was without prejudice so that Petitioner could exhaust his state remedies. This federal petition followed.

II

ARGUMENT

1. It is clear that the Petitioner has again failed to exhaust his state remedies. Petitoner has raised three grounds

in this federal habeas corpus petition. Of these three grounds, only two (grounds 1 and 2) have been presented to both the state trial and appellate courts, which have considered and rejected them, (Exhibits "A", "B"). Ground (3), the alleged unconstitutional failure of the prosecution to disclose evidence favorable to the defendant, has never been presented to, and therefore has not been considered by any state court, trial or appellate.[1]

It is well established that the federal courts will refrain from considering habeas corpus claims until all presently available state remedies are exhausted. Rose v. Lundy, __U.S.__, 102 S.Ct. 1198 (1982); Picard v. Connor, 404 U.S. 270, 92 S.Ct. 509 (1971); Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822 (1963). Comity requires both presentation to and consideration of an issue by both the trial and the state appellate courts before consideration thereof by this court is appropriate. See Williams v. Wainwright, 410 F.2d 144 (5th Cir. 1969). See also Lambert v. Wainwright, 513 F.2d 277 (5th Cir. 1975); McBride v. Estelle, 507 F.2d 903 (5th Cir. 1975). Thus, any federal habeas corpus petition raising claims not fully presented to all available state courts must be dismissed. See Burroughs v. Wainwright, 454 F.2d 1165 (5th Cir. 1972); Meachman v. Beto, 451 F.2d 187 (5th Cir. 1971); 28 U.S.C. §2254. In the instant case, petitioner has not presented ground three (3) to any state court. Thus, the petitioner has not exhausted his available state remedies as to one of the three grounds that his petition is presently raising before this court.

Furthermore, where a petitioner presents more than one claim in a petition for a federal writ of habeas corpus, failure to exhaust remedies of any of the claims require dismissal without prejudice of the entire petition until the exhaustion rule has been complied with as to all issues. A federal district

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1 Respondent notes this in his present Petition, the Petitioner alleges that ground (3) was raised in his direct appeal. It is clear from Exhibit "A", that ground (3) was not raised.

court must dismiss a state petitioner's habeas corpus petition if it contains both exhausted and non-exhausted claims. Rose v. Lundy, ___U.S.___, 102 S.Ct. 1198, 1199 (1982); Turner v. Wainwright, 550 F.2d 1012 (5th Cir. 1977); Galtieri v. Wainwright, 545 F.2d 942 (5th Cir. 1977).

2. Respondent also requests that this Court order the Petitioner to respond and state whether he intends to abandon the unexhausted speedy trial claim that he raised in his previous petition. Although the Petitioner is not raising the speedy trial claim in the present petition, he has not made an attempt to exhaust that issue before filing the present petition. Unless the Petitioner abandons the speedy trial claim forever, he would be engaging in the type of piecemeal litigation that constitutes an abuse of the writ under 28 U.S.C. §2254 Rule 9(b). In Rose v. Lundy, ___U.S.___, 102 S.Ct. 1204, 1205, the United States Supreme Court addressed this issue by stating:

> The prisoner's principal interest, of course, is in obtaining speedy federal relief on his claims. A total exhaustion rule will not impair that interest since he can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims. By invoking this procedure, however, the prisoner would risk forfeiting consideration of his unexhausted claims in federal court. Under Rule 28 U.S.C. §2254 Rule 9(b), a district court may dismiss subsequent petitions if it finds that failure of the petitioner to assert those [new] grounds in a prior petition constituted an abuse of writ. . . . Thus a petitioner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions. [citations omitted].

The district courts in the Southern District of Florida have required petitioners who file successive petitions with non-exhausted state claims and exhausted state claims to abandon the non-exhausted claims if they wanted to court to hear the exhausted claims on the merits. In William B. Dillingham v. Louis L. Wainwright, Case No. 76-451-Civ-JLK, the petitioner filed a petition for a writ of habeas corpus which was dismissed for failure to exhaust available state remedies. The petitioner

then filed a different petition, raising an issue that was one of the several issues raised previously. The petitioner had not made an attempt to exhaust the other issues in the prior petition. Judge King in an order dated May 28, 1976, held that the petitioner could not engage in piecemeal litigation regarding all the issues he had indicated a desire to litigate in a federal habeas corpus proceeding. In order to prevent an abuse of the Great Writ and avoid iminent piecemeal litigation, the petitioner had to indicate whether he intended to abandon forever those grounds for relief asserted in his prior petition, but not asserted in the instant petition. (See Exhibit "E").

Respondent therefore respectfully submits that the petitioner should be required to state whether he intends to abandon his speedy trial claim asserted in his prior petiton. In addition, the Respondent submits that the petition should be dismissed without prejudice to the petitioner to properly exhaust all of his state court remedies with respect to all of the claims that he has presented to this Court.

3. In the event that this Court should disagree with Respondent's position on exhaustion of state remedies, then the respondent respectfully requests this Court to allow the Respondent to file a memorandum of law addressing the merits of the issues within a reasonable time after such determination.

WHEREFORE, the respondent respectfully requests that the petition for writ of habeas corpus be denied.

Respectfully submitted,

JIM SMITH
Attorney General

Penny H Hershoff

PENNY H. HERSHOFF
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION TO DISMISS AND/OR EXTENSION OF TIME AND MEMORANDUM OF LAW was furnished by mail to MICHAEL HUTCHINS, #053170, Cross City Correctional Institute, Post Office Box 1500, Cross City, Florida, on this 10th day of June, 1982.

PENNY H. HERSHOFF
Assistant Attorney General

ph/

IN THE U[illegible]D STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-0420-Civ-JE

MICHAEL HUTCHINS,
Petitioner,
vs.
LOUIE L. WAINWRIGHT, as Secretary, Department of Corrections, State of Florida,
Respondent.

NOTICE OF ELECTION OF REMEDIES

The petitioner, Michael Hutchins, by and through undersigned counsel, files this notice of election of remedies pursuant to the order of this Court entered September 16, 1982 in the above-styled cause, and states:

1. The first petition for writ of habeas corpus filed by petitioner (Case No. 78-3264-Civ-NCR) alleged four grounds for relief: 1) denial of a speedy trial; 2) exclusion by the trial court of favorable evidence; 3) failure of the prosecution to disclose favorable evidence; and 4) unconstitutional admission by the trial court of hearsay evidence. On September 24, 1979, this Court dismissed the petition without prejudice, finding that the second and fourth claims had been presented to the state appellate court on direct appeal, but that the first and third had not.

2. The present petition presents three grounds for relief: 1) the exclusion of testimony by the trial court; 2) unconstitutional admission by the trial court of hearsay testimony; and 3) failure of the prosecution to disclose favorable evidence. The motion to dismiss filed by respondent concedes that the first and second grounds have been properly presented to the state courts and are exhausted claims subject to federal habeas corpus review, but asserts that the third ground has not been properly presented, rendering the petition subject to dismissal without prejudice pursuant to Rose v. Lundy, ___U.S.___, 102 S.Ct. 1198 (1982). Respondent further alleges that petitioner should be required to state his intentions regarding the unexhausted speedy trial claim

SEP 16 1982

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-0420-Civ-JE

MICHAEL HUTCHINS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ORDER

Elliot H. Scherker, Esq., having communicated his willingness to appear in this cause as counsel for Petitioner, it is now Ordered:

1. Within forty-five (45) days he shall file his Notice of Appearance, and his Announcement of those grounds upon which Petitioner seeks to proceed or which he waives or discards, and such other Memoranda as he may choose.

2. Ruling upon any defensive Motion is deferred.

In Miami, Florida, September 16, 1982.

Peter L. Nimkoff
PETER L. NIMKOFF
UNITED STATES MAGISTRATE

Copies to:

Penny Hershoff, Esq.
Michael Hutchins
Elliot Scherker, Esq.

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presented in the first petition for writ of habeas corpus.

3. The speedy trial claim was raised in the state courts by a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. A copy of the motion is appended hereto, and it reflects that the claim was essentially raised under Rule 3.191 of the Florida Rules of Criminal Procedure, the state speedy trial provision, and not as a federal constitutional issue. Petitioner has authorized the undersigned to state that he does not intend to seek federal habeas corpus relief on this claim, either in the present proceeding or in a subsequent action.

4. The third claim in the present petition, that the prosecution failed to disclose favorable testimony, was also raised in the first petition. A reading of the claim as drafted by petitioner in the two petitions suggests that it is a variation on the exhausted confrontation/hearsay claim. Petitioner has so advised the undersigned, and explained that he was attempting to state similar grounds, i.e., that the prosecution introduced the statements of an undisclosed informant. Petitioner has authorized the undersigned to state that, to the extent that this claim recites an independent basis for federal habeas corpus relief under the Due Process Clause of the Fourteenth Amendment, see, e.g., Brady v. Maryland, 373 U.S. 83 (1963), such claim is hereby abandoned.

5. Petitioner will accordingly proceed before this Court upon the following two claims:

A. The exclusion by the trial court of relevant and material exculpatory evidence offered by petitioner, in violation of the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

B. The admission by the trial court of incriminating out-of-court statements of an unidentified and undisclosed informant, in violation of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1351 N.W. 12th Street
Miami, Florida 33125

BY: ELLIOT H. SCHERKER
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing notice was mailed to Penny Hershoff, Assistant Attorney General, 401 N.W. 2nd Avenue, Miami, Florida this 19th day of October, 1982.

ELLIOT H. SCHERKER
Assistant Public Defender

FILED by ____ D.C.

OCT 25 1982

CLERK, U. S. DIST. CT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-0420-Civ-JE

MICHAEL HUTCHINS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, et al.,

Respondent.

O R D E R

Mr. Scherker's appearance as counsel to Petitioner is approved. Mr. Wainwright is substituted as Respondent. The cause will proceed on two claims only:

(a) The exclusion of evidence of another ostensibly similar crime;

(b) The admission of testimony and arguments regarding an unidentified informant.

On these questions the Respondent is invited to file and serve any further Memorandum (if counsel feels one is required) on or before November 22, 1982.

Argument on these questions is hereby scheduled for Monday, November 29, 1982, at 4:00 p.m. (thirty minutes to each side). If the parties desire a court reporter, they shall make those arrangements.

In Miami, Florida, October 25, 1982.

PETER L. NIMKOFF
UNITED STATES MAGISTRATE

Copies to:

Elliot Scherker, Esq.
Penny Hershoff, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-0420-Civ-JE

MICHAEL HUTCHINS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, as Secretary, Department of Corrections, State of Florida,

Respondent.

MEMORANDUM OF LAW IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

The Respondent, Louie L. Wainwright, by and through his undersigned counsel, files this Memorandum of Law in Opposition to the Petitioner's Petition for Writ of Habeas Corpus, in response to this Court's Order of October 25, 1982, as states as follows:

I.

PROCEDURAL HISTORY

Respondent has previously filed several exhibits with its Motion to Dismiss, which in order to avoid confusion, will be referred to as the Petitioner has done in his memorandum: The symbol "R" will designate the record on appeal, filed as a part of Exhibit F; the symbol "SR" will designate the supplemental record on appeal included within the same exhibit; and the remaining exhibits will be referred to by their corresponding letter designation.

2. As stated in Respondent's Motion to Dismiss, the Petitioner is presently in custody of Louie L. Wainwright, Secretary, Department of Corrections, State of Florida, pursuant to a valid judgment of guilt entered by the Circuit Court of Dade County, Florida, Criminal Division, Case No. 75-7951. The Petitioner on April 15, 1976, after a trial by jury was convicted of robbery and an assault with intent to

commit second-degree murder. (R.259). Petitioner was sentenced to a term of twenty (20) years imprisonment on the robbery conviction, and to a term of ten (10) years in the state penitentiary on the assault conviction, this latter sentence to run concurrently with the sentence imposed for robbery. (R.261).

3. Petitioner appealed his conviction to the District Court of Appeal, Third District, raising two grounds: (1) that "the trial court erred in excluding the testimony of the only defense witness on the ground of irrelevancy where the defendant proferred that this testimony was relevant to the identity of the perpetrator of the crime and would exculpate the defendant, thereby violating the defendant's due process right to prepare and present a defense under the Sixth and Fourteenth Amendments to the constitution of the United States..." and (2) that "the trial court erred in allowing prosecutorial comments regarding the investigating officers encounters with an unidentified third person to pervade the entire trial, where the only purpose of this argument was to lead the jury to draw the impermissible inference that this third person had identified the defendant as the perpetrator of the charged crime, but was afraid to testify in court." See Exhibit "A", Points I and II on Appeal. The Petitioner was represented by counsel on his direct appeal.[1] The Third District Court of Appeal, per curiam affirmed the Petitioner's conviction, without an opinion. Hutchins v. State, 349 So.2d 1237 (Fla. 3d DCA 1977).

4. Subsequently, Petitioner filed a motion for post-conviction relief, pursuant to Rule 3.850 of the

[1]Petitioner's counsel on his direct appeal is the same counsel who is presently representing him on the instant petition.

Florida Rules of Criminal Procedure, alleging a violation of his state right to a speedy trial. The motion was denied by the trial court on January 9, 1978. (See motion and order attached to Petitioner's Notice of Election of Remedies.) No appeal was taken from the denial of the motion.

5. Petitioner, later filed a Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. §2254, in the United States District Court, Southern District of Florida, Case No. 78-3264-Civ-NCR. (Exhibit "C"). In said Petition, Petitioner raised four grounds, (1) the denial of the right to a speedy trial, (2) the conviction was obtained by the unconstitutional failure of the court to disclose evidence favorable to the defendant, (3) the conviction was obtained by the unconstitutional failure of the prosecution to disclose evidence favorable to the defendant, and (4) the conviction was obtained by the court's unconstitutional act of letting hearsay evidence in, which was only favorable to the prosecution. The petition was dismissed by the district court for failure to exhaust state remedies as to issue number 1, the denial of the right to a speedy trial, and issue number 3, the failure of the prosecution to disclose evidence favorable to the defendant. See Exhibit "D". The dismissal was without prejudice so that Petitioner could exhaust his state remedies.

6. On March 2, 1982, the present Petition for Writ of Habeas Corpus was filed. Petitioner has alleged three grounds for relief: (1) the trial court denied the defense counsel's request to produce a witness who could exculpate the defendant, in violation of the Sixth Amendment; (2) that his conviction was obtained by the unconstitutional act of allowing "hearsay evidence" to be admissible, and (3) that his conviction was obtained by the unconstitutional failure of the prosecution to disclose evidence favorable to the defendant.

7. In response to the petition, the Respondent filed a motion to dismiss, conceding that the first and second grounds had been properly presented to the state courts, but asserting that the third ground had not been properly presented, rendering the petition subject to dismissal without prejudice pursuant to Rose v. Lundy, ___U.S.___, 102 S.Ct. 1198 (1982). Respondent further requested that the Petitioner state his intentions regarding the unexhausted speedy trial claim. The Petitioner, in response, has filed a Notice of Election of Remedies, forever waiving his claims as they relate to a violation of his right to a speedy trial and as a violation of the Due Process Clause of the Fourteenth Amendment, see, e.g., Brady v. Maryland, 373 U.S. 83 (1963). Petitioner then filed a memoradum of law in support of his petition, proceeding upon the following two claims:

> A. The exclusion by the trial court of relevant and material exculpatory evidence offered by petitioner, in violation of the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.
>
> B. The admission by the trial court of incriminating out-of-court statements of an unidentified and undisclosed informant, in violation of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

II.

ARGUMENT

A. Petitioner has waived his claim that the admission by the trial court of incriminating out-of-court statements of an unidentified and undisclosed informant, violated the Confrontation Clause of the Fourteenth Amendment to the Constitution of the United States or in the alternative Petitioner has not exhausted this claim.

During the trial in this cause, the prosecutor proferred during his opening statement the details of the investigation by the police officers into the offenses in this case. Included in this proffer was the testimony of Detective Purdy to the effect that Detective Purdy had a conversation with a young black male who later gave information to the police which led them to the arrest of the Petitioner. (R.22-26). Counsel for the Petitioner objected at this point on the ground that the prosecutor was referring to inadmissible hearsay evidence, especially in light of the fact that counsel was unable to find out who the young black male was and to question him. (R.23). During Detective Purdy's testimony, counsel renewed his objection. (R.88). Detective Shipes was also permitted to testify concerning a meeting with a young black male, that led to the area of 1840 Northwest 60th Street. (R.101). Defense counsel again moved for a mistrial. (R.102). During closing argument, the prosecutor referred to the meeting between Detective Shipes and the unidentified black male. (R.166).

On direct appeal, counsel for the Petitioner asserted as one of his points on appeal that "the trial court erred in allowing prosecutorial comments regarding the investigating officers encounters with an unidentified

third person to pervade the entire trial, where the only purpose of this argument was to lead the jury to the impermissible inference that this third person had identified the defendant as the perpetrator of the charged crime, but was afraid to testify in court." See Exhibit "A", Point II on Appeal. In support of this allegation of error, the Petitioner cited state cases that admonished prosecutors from making comments that could not be reasonably inferred from the evidence or which was inflammatory and calculated to raise passion or prejudice in the minds of the jury. See Exhibit "A", Brief of Appellant at 22-24. Although, Petitioner's trial counsel had objected to the introduction of the evidence relating to the unknown black male, as hearsay, Petitioner's appellate counsel never once couched the claim in terms of a violation of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. Likewise, the State's brief cited state cases concerning prosecutorial comments and did not address the issue in terms of a violation of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. See Appendix "B", Brief of Appellee at 16-28. Thus it is quite evident that the Petitioner's second claim, that of a violation of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment has never been presented to the state appellate court for review.

Respondent submits that this failure to fairly present this issue to the state courts is not one of non-exhaustion,[2] but rather one of waiver under the doctrine of Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977). In Wainwright, the United States Supreme Court held that

[2]The Respondent is asserting that the Petitioner has waived this claim, but if this Court finds there has been no waiver because the Petitioner still has a state remedy, then Respondent asserts in the alternative, that this claim is unexhausted. See infra at 9-10.

failure to make a timely objection under Florida's contemporaneous objection rule to the admission of his inculpatory statements, absent a showing of cause for the noncompliance with the procedural rule and some showing of actual prejudice, bars federal habeas corpus review of the defendant's Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966) claim. This cause and prejudice requirement of Wainwright v. Sykes has been extended to include claims which the defendant has failed to include on direct appeal in compliance with state procedural appellate requirements. See, e.g., Wright v. Bombard, 638 F.2d 457 (2d Cir. 1980); Forman v. Smith, 633 F.2d 634 (2d Cir. 1980); Cole v. Stevenson, 620 F.2d 1055 (4th Cir. 1980); Evans v. Maggio, 557 F.2d 430 (5th Cir. 1977); Carter v. Scully, 533 F.Supp. 257 (S.D.N.Y. 1982).[3] Respondent submits that Wainwright v. Sykes is applicable to the instant case because under state procedural rules, the Petitioner would be precluded from raising the Confrontation Clause issue on collateral review. See, e.g., Engle v. Isaac, ___U.S.___, 102 S.Ct. 1558, 1570 n.28 (1982). Under Rule 3.850 of the Florida Rules of Criminal Procedure, the Petitioner would be precluded from raising this issue, because it is a matter which could have been raised on direct appeal. Florida courts have consistently held that issues which could have

[3]But see Crick v. Smith, 650 F.2d 860 (6th Cir. 1981) in which the Sixth Circuit held that the Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822 (1963) standard of "deliberate by-pass" rule, rather than the "cause and prejudice" rule of Wainwright v. Sykes, supra, is applicable to procedural default on direct appeal. Respondent submits that the court's reliance on Chief Justice Burger's concurring opinion in Wainwright v. Sykes in which he stated that because a decision to appeal is made upon consultation and approval of the defendant, Fay v. Noia would be applicable, is misplaced. Although the decision to appeal may be the defendant's, the decision as to which issues to pursue are normally left to the discretion of the attorney. Thus, there is no reason to distinguish decisions to make contemporaneous objections at trial with decisions to appeal certain issues and not others. Therefore, the Respondent submits that Wainwright v. Sykes is the applicable standard on the failure to present claims to the state appellate court on direct review.

been raised on direct appeal from the conviction will not support a subsequent collateral attack by way of a motion for post-conviction relief. See, e.g., Alvord v. State, 396 So.2d 184, 191 (Fla. 1981); Adams v. State, 380 So.2d 423, 424 (Fla. 1980); Harvey v. State, 383 So.2d 770, 771 (Fla. 3d DCA 1980). Thus, Respondent submits that because Petitioner's Confrontation Clause claim is foreclosed from state review due to procedural default, this Court must dismiss the Confrontation Clause claim absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation.

The Respondent asserts that Petitioner has not shown any cause for his failure to raise the Confrontation Clause issue on his direct appeal to the Third District Court of Appeal. Any allegations that appellate counsel was ineffective for failing to raise the issue on direct appeal must be rejected as insufficient reasons to satisfy the "cause" requirement. See, e.g., Washington v. Estelle, 648 F.2d 276, 278 (5th Cir. 1981); Lumpkin v. Ricketts, 551 F.2d 680, 683 (5th Cir. 1977). See also Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978)(en banc); Indiviglio v. United States, 612 F.2d 624 (2d Cir. 1979). It is not proper for federal courts to speculate on the possible reasons for a failure to follow procedural rules. Tyler v. Phelps, 643 F.2d 1095, 1100 (5th Cir. 1981). Furthermore, cause for a failure to follow state procedure cannot exist because the error "went to the central issue of guilt or innocence and infected the fairness of the trial itself. Tyler v. Phelps, supra, at 1101 n.9. Plain error cannot substitute for a failure to show cause. Engel v. Isaac, ___U.S.___, 102 S.Ct. 1558, 1575 n.43 (1982). See also United States v. Frady, ___U.S.___, 102 S.Ct. 1584 (1982). Thus, Respondent submits that the Petitioner having failed to show cause, it

is not necessary for this Court to determine if there was actual prejudice.[4] Therefore, this Court is barred from considering the Petitioner's Confrontation Clause claim as grounds for federal habeas corpus relief. See, e.g., Washington v. Estelle, supra at 278.

However, if this Court should find that a Wainwright v. Sykes, supra waiver is not applicable to the instant case, the Respondent submits that the Petition should be dismissed without prejudice for failure to exhaust his state remedies. As stated supra, a review of the brief filed by the Petitioner in his direct state appeal as well as the brief filed by the state, clearly shows that the claim that the Petitioner is now asserting, that the admission by the trial court of incriminating out-of-court statements of an unidentified and undisclosed informant, was in violation of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, has not been previously presented to the state courts with a fair opportunity to apply controlling legal principles.

The United States Supreme Court in Anderson v. Harless, ___U.S.___, 32 Cr.L. 4063 (November 1, 1982) recently held that the constitutional argument that a defendant relies upon for relief in a federal habeas corpus petition must be specifically presented to the state courts. It is not enough that all facts necessary to support the federal claim were before the state courts or that a similar state law claim was made. See also Thomas v. Wyrick, 622 F.2d 411, 413 (8th Cir. 1980). Alleging lack of a fair trial does not sufficiently alert the state court to a contention that the trial court failed to comport with due process guarantees.

[4]Respondent asserts that any error that occurred with the admission of the hearsay testimony was harmless beyond a reasonable doubt. See text infra at 19-21.

Kirksey v. Jones, 673 F.2d 58, 59-60 (2d Cir. 1982). The Respondent submits tht the Petitioner has not "fairly represented" to the state courts the "substance" of his Confrontation Clause claim. Thus, the Petitioner has failed to exhaust his state remedies. Rose v. Lundy, ___U.S.___, 102 S.Ct. 1198 (1982). Pitchess v. Davis, 421 U.S. 482, 98 S.Ct. 1748 (1975); Piccard v. Conner, 404 U.S. 207, 92 S.Ct. 509 (1971). See also Shane v. Iowa, 581 F.2d 727 (8th Cir. 1978).

Respondent would submit that his previous concession that the Confrontation Clause claim had been exhausted was erroneous. By raising the issue of exhaustion in this memorandum, Respondent has corrected his error and has not waived the defense of lack of exhaustion of state remedies. Hopkins v. Jarvis, 648 F.2d 981, 983 n.2 (5th Cir. 1981); Bufalino v. Reno, 613 F.2d 568, 570 n.2 (5th Cir. 1980). See also Davis v. Campbell, 608 F.2d 317 (8th Cir. 1979); United States v. Hatrack, 563 F.2d 86 (3d Cir. 1977).

Respondent asserts that because Petitioner has not exhausted his Confrontation Clause claim, the instant petition must be dismissed as a mixed petition. Where a petitioner presents more than one claim in a petition for a federal writ of habeas corpus, failure to exhaust remedies of any of the claims require dismissal without prejudice of the entire petition until the exhaustion rule has been complied with as to all issues. A federal district court must dismiss a state petitioner's habeas corpus petition if it contains both exhausted and non-exhausted claims. Rose v. Lundy, ___U.S.___, 102 S.Ct. 1198, 1199 (1982); Turner v. Wainwright, 550 F.2d 1012 (5th Cir. 1977); Galtieri v. Wainwright, 545 F.2d 942 (5th Cir. 1977).

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 82-0420 CIV JE

MICHAEL HUTCHINS,

Petitioner

vs.

LOUIE L. WAINWRIGHT,

Respondent.

300 Northeast 1st Avenue
Miami, Florida
November 29, 1982
4:00 p.m.

The above-entitled cause came on for hearing before the Honorable Peter L. Nemkoff, pursuant to Notice.

Laws Reporting, Inc.
Official Court Reporters

APPEARANCES:

PENNY H. HERSHOFF
Assistant Attorney General
Attorney General's Office
Miami, Florida
On behalf of the Petitioner

BENNETT H. BRUMMER
Public Defender
By: ELLIOT H. SCHERKER
Assistant Public Defender
Public Defender's Office
On behalf of the Respondent.

THE COURT: Mr. Scherker, Mr. Hutchins now presses two claims which I hope I accurately identified in the order which is set for today.

Do you wish to argue both?

MR. SCHERKER: Yes, sir.

THE COURT: Go ahead, sir.

MR. SCHERKER: If the Court please, we're before the Court on two claims.

The first is the exclusion of provative evidence offered by Mr. Hutchins' counsel at trial.

Secondly, the admission of hearsay statements or the essence of hearsay statements of an unidentified informant who allegedly inculpated Mr. Hutchins.

Now, previously the Respondent has in its memorandum filed November 22nd, raised procedural arguments regarding the second claim which I'd like to briefly address before I reach the merits of our issues.

The State's argument in essence is that we are barred from proceeding under Engle vs. Issac or alternatively have failed to satisfy the exhaustion doctrine.

The basis for both of these claims appears on page six of the State's memorandum. It is essential that the confrontation issue was not properly raised before the State Appellate Court.

Laws Reporting, Inc.

From their premises, the State argues first that we are barred from proceeding and have waived the claim under Engle vs. Issac and Wainwright vs. Sykes because of State procedural default.

Dismissal with prejudice is sought on this claim on that basis. On the alternative, we have failed to exhaust our State remedies because of the insufficiency of the Federal claim to the State court requiring a dismissal without prejudice.

THE COURT: The State filed one November 22nd? If one was filed so recently, it has not come to me. Perhaps the State will hand up another copy.

MS. HERSHOFF: I have another copy. I did hand deliver it to your office.

THE COURT: I'm sorry, unless it is one which I did -- I beg your pardon. I have it. I had not realized that it was the one most recently filed. I do have it.

Yes, sir, it's not clear to me exactly what position the State takes with regard to the second claim, which you wish to present here. Is it seeking to tell me that it was not raised before the District Court of Appeals?

MR. SCHERKER: That's correct, Judge, from that, both --

THE COURT: Is it true that it was not raised?

MR. SCHERKER: The essence claim was raised.

THE COURT: I say that because I had thought from my prior recollection of the file that that claim was asserted from the Third District Court of Appeals.

MR. SCHERKER: Our history starts with the history of this Court which may be at some length.

First, the petition filed by Mr. Hutchins was filed pro se under Case 78-3264. It was before Judge Rutger. At that time four claims were raised; a speedy trial claim, an exclusion of evidence claim which regards what is literally called a reverse Williams claim in this proceeding alleging nondisclosure of favorable evidence. Apparently speaking to Brady vs Maryland and the unconstitutional admission of the hearsay.

Judge Rutger on the State's motion entered an order of dismissal which is dated November 24, '79. It's appended to the State's initial response to the Court's order to show cause as Exhibit D.

The first page of the order specifies the four claims numbered one, two, three and four. Two and four are claims that are before this Court in this proceeding. The order finds -- I'm quoting -- "Hutchins raised the substantial equivalent of numbered issues two and four on direct appeal to the Third District Court of Appeals of Florida, which confirmed, I assume, that affirmed his

conviction."

That the second page of the order, "It is evident that although Hutchins has exhausted the State's remedy to the two of the four remedies raised in the petition, it has not exhausted as to the first and third claim." Apparently, this was entered in the file. I say apparently because I checked the Court file. The State's motion to dismiss is not in the Court file and I say, apparently, because of the way the order reads and because that was the position the State took initially in this proceeding.

In any event, the State would not appeal that order which it would have had a right to do if it was, in fact, adverse to the State's position. Initially, we have submitted that res judicata on any issue as to whether or not the substantial equivalent of the second issue was raised.

THE COURT: Had Judge Rutger not so ordered, were the res judicata not available to you, you would say that that, in fact, in any event the claim was asserted before the Third District?

MR. SCHERKER: I don't get to that issue because the State's conduct in this litigation is the next step of our argument, if I might?

The State's initial memorandum in response to

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the order to show cause was essentially a motion to dismiss on procedural issues and request the Court for leave for an extension of time to address the merits.

In that pleading at pages two and three, the State specifically again represents that the substantial equivalent of issues two and four, again, the two issues we're before the Court on now, now two and three -- I beg your pardon, ground one and ground two in this proceeding. Mr. Hutchins can raise a speedy trial claim initially, which he has since abandoned.

Reading from page two of the State's initial memorandum which is filed and a motion to dismiss or extension of time for memorandum of law. The Petitioner appeals this conviction to the Third District Court of Appeals and raises a subsequent issue -- I assume this is substantially two of the four grounds -- actually two of the three grounds which they are presently raising in this habeas corpus petition.

Ground one is the exclusion of the defense witness on the basis that his testimony was irrelevant. Ground two is the admission of hearsay evidence at his trial.

Again, their petition notes Judge Rutger's order on proceedings. Then, at page three of these three grounds, only two grounds, ground one and two,

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again, the two grounds we're before the Court on now, have been presented to both State trial and Appellate courts which considered and rejected them.

The State's initial position was then to waive whatever procedural arguments it may have had. Of course, the authorities are well established, the Fifth Circuit authority that the State has a right to and can and will be held to waivers of procedural arguments.

The cases I primarily relied on for that proposal are Collins vs. Estelle at 474, F.2d, 98A; Houston vs. Estelle, 569 S.2d, 372 and Messelt vs. Alabama, 559 F.2d, 247.

The case mine is most analagous to is LaRoache vs. Wainwright, 599 F.2d, 722 at Page 725 in dismissing a similar procedural status, the court held: "We need not reach the State's procedural arguments because they have waived hereby a failure of raising them either in the first federal habeas proceeding that was dismissed for a failure to exhaust State remedies or the second dismissal after LaRoache has been denied relief by the State court."

Assuming that I am correct that the State did not assert the first habeas procedures, that the State has not exhausted State remedies, regardless of the findings of Judge Rutger, they're barred. The State

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agreed with that order that they have the right to appeal.

Finally, I have urged a form of equitable estoppel at the time Mr. Hutchins was requesting to state our preference as to forum and grounds. The State's litigation was that the State had abandoned any procedural arguments which might have been. We have predicated upon those decisions and the State should be held in.

In weighing the equities which are involved in both waiver and exhaustion since both are essentially both essentially spring from the same policy, I'd like to note the exhaustion really is not at issue in this case. The Petitioner has no available State remedies at this point as the Respondent correctly points out in his memorandum of law.

State post conviction is unavailable if the issues are raised on direct appeal. If they could have been raised on direct appeal. There are no availalle State remedies.

Footnote 28 of the Engle decision, the Supreme Court specifically held that a petitioner who's in the position of not having State post conviction available under law very similar to Florida, has for all practical purposes and as a matter of law, quote, unquote, exhausted available State remedies because there are none.

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So, the question really in terms of the State's procedural posture, should Mr. Hutchins be forever barred from seeking habeas corpus relief from under Section 2254 based upon what is a claim to be a failure to raise the issue on direct appeal which he would like to address.

The merits of the claim in a balance of the appropriate equities, just briefly. Our claim on direct appeal, referring to Page 20 of the Appellee's brief, which is appended to the State's response, its initial response, is, I quote:

> "The trial court erred in allowing prosecutorial comments regarding the investigating officer's encounters with an unidentified third person to pervade the entire trial, where the only purpose of this argument was to lead the jury to draw the impermissible inference that this third person had identified the defendant as the perpetrator of the crime but was afraid to testify in court."

The argument was that the prosecutor essentially urged the jury to accept as true these, quote, unquote, statements, the essence of these statements as evidence

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of guilty and, essentially, argued you would believe this testimony if I'd been able to present this witness, but he's afraid to testify.

Lo and behold, when the officers went to arrest Mr. Hutchins, where did they find him? The same address they had driven to the unidentified informant. The prosecutor urged the jury that the witness didn't come in because he was afraid to testify. Confrontation claim. Relying upon through a witness whom the Defendant has no opportunity to cross examine at trial.

THE COURT: Putting aside the question on the various sides, the State is estopped to argue, otherwise I would be curious to hear the argument. The second claim that you now seek to press in this Court was not presented to the Third District Court of Appeals because I have your brief there. And their similarity is remarkable.

MR. SCHERKER: It's our point -- it's our position, although book and verse is not cited in the brief, the essence of the claim, not just the facts in the claim, the essence of what we're asserting here was asserted before the District Court of Appeals.

And there was one other issue in this regard I would like to briefly touch on. To the extent that the failure to cite book and verse of the Constitution to

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the extent that the use of the confrontation clause does not appear in the brief, and to the extent that Engle would then apply, Engle is, of course, a trial rule. The failure to apply the preservation of rules at trial. Where a State court relies upon the procedural default to reject the claim will bar federal habeas corpus review.

The Respondent's memorandum notes that the applicability of this rule to alleged defaults on appeal are open to some question. There was some authority for the proposition in Favre vs. Henderson and Engle vs. Issac, at least Chief Justice Burger said that Sykes suggests that we're talking about appellate proceedings, as the Respondent correctly notes, however, it's irrelevant whether we are by-passing cause and prejudice.

In essence, the State Appellate Court approved by its procuring opinion the tactics of the prosecutor in urging his testimony to be true, in urging the jury to rely on it for its truth. It's a subject that the Court would have held that the introduction of the evidence upon which a non-hearsay evidence or allegedly not introduced at all upon which the prosecutor based his argument would be erroneous, that would invoke the rules of Henry vs. Wainwright, 661 F.2d, Page 56A and the second Henry case, 68687, 311.

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The Henry issues involved a claim by the State of whether or not to object to the introduction of certain evidence at a death penalty sentencing hearing, but did not object to the introduction regarding that evidence that was barred under Sykes. The Court in the first Henry decision rejected that claim because it said the Defendant's counsel had objected to the introduction of the evidence and it would be futile under Florida law, well established Florida law, for the attorney to continue to repeat the objection. Therefore, he wasn't barred.

Essentially, Henry was taken to the United States Supreme Court, which granted certiorari and vacated Henry in light of the subsequent decision in Engle vs. Issac.

In Engle vs. Issac, there is a law, what the court called futility. Briefly, that what the State would be asserting was insufficient to get around the procedural bars of that decision.

After reconsidering the case and in light of Engle vs. Issac, the former Fifth Circuit reached the exact same conclusion noted in the second Henry case, footnote three:

"The futility we're talking about is when you voice an objection and it's overruled,

you don't have to keep repeating it."

Applying that to the appellate context, what we have is a court that approved of the prosecutorial tactic of urging the jury to buy that testimony as true and applying the same trial rules to the appellate context, that would clearly have been futile to urge that the testimony wasn't properly introduced in the first place.

I make these comments because the important point is that the State, at very best, would have a tenuous, highly tenuous Issac vs. Idden (phonetic) claim which is all the more reason to bind to Judge Rutger's finding in what has been a consistent waivers respect position. No substantial injustice is done at this stage of the claim.

THE COURT: It's pretty clear to me that this claim is ripe.

MR. SCHERKER: I would like to address the merits of the claims.

THE COURT: Yes.

MR. SCHERKER: First claim is the exclusion of what we submit was highly relevant, provative testimony.

Briefly, the offense involved a cab driver who was dispatched to the Veteran's Hospital here in Miami. He was directed to Northwest 22nd Avenue and 61st

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Street. He was robbed by a man at knife point who he identified from a photographic array which was displayed while in the hospital. There was never any live line-up.

What the court concluded was evidence of another offense approximately one month earlier in which the driver of the same cab company was called to the Veteran's Hospital, directed to 22nd Avenue and 61st Street, the same location, and robbed at knife point.

This individual also identified Mr. Hutchins when he was shown a photographic array.

He is then shown a line-up in which Mr. Hutchins is present. He identified the robber as having been one of two other people. He picked two people out that looked like the robber. He did not identify Mr. Hutchins.

The Respondent concedes that the Defendant is entitled to prove his innocence by showing the guilt of another. This includes the right to present evidence of other similar crimes submitted by -- was this evidence probative under those rules? That's the sole dispute.

Florida's leading decision is the Williams decision, so called collateral crimes can be submitted as guilt. This rule is equally applicable to a defendant. And when we're talking about a federal habeas review of State evidentiary ruling, it's critical to know

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exactly what the State evidentiary law is.

Moreno, which is cited in split form, it's now reported at 418 S.2d, 1223, it states Page 1225 in which it adopts the exact role which was involved in this case.

"Where evidence tends in any way even indirectly to prove a defendant's innocence, it is error to deny its admission."

The court then goes on to adopt the so called reverse Williams Rule.

THE COURT: If permitted by the trial judge, whom would you have called on this point?

MR. SCHERKER: Mr. Lowell Lewis, who was the victim of the other offense.

THE COURT: The first cab driver?

MR. SCHERKER: That's correct.

THE COURT: You would have established through him his assertion that he was robbed at knife point under the circumstances you described and you believe his admission that at a photo line-up he selected Mr. Hutchins and that at a live line-up he did not select Mr. Hutchins; he selected instead either of two other persons?

MR. SCHERKER: That's correct.

THE COURT: And what is the probative value of that if admitted?

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MR. SCHERKER: Several respects.

First, it would provide a basis to argue that a robber in the collateral crime and in this crime had the same modis operandi and was one of those two other men.

Secondly, it would have provided a basis to argue that it was somebody besides Michael Hutchins. The critical fact is not so much that he picked out one of two other people, but that he didn't pick out Michael Hutchins. He was faced with Hutchins and he said it was one of those two other people.

It would provide a basis to argue either of those things.

We have two identical robberies committed in a very uniquely similar way. There was no doubt that if Michael Hutchins had been identified by Mr. Lewis, that the State would have been able to introduce that testimony at Michael Hutchins' trial as evidence of guilt.

The fact that he was not identified by Mr. Lewis switches it around. It's equally probative evidence of innocence that somebody else was committing the same kind of robbery, whether it was one of those two men or not that Mr. Lewis selected at the live line-up. It was not Mr. Hutchins.

There was one additional circumstance in this

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case. Bear in mind the conditions under which the victim in this case identified Mr. Hutchins in the photo line-up.

He was in the hospital. He had been badly wounded. He was under sedation. He was apparently semi-coherent to the extent that he thought he was shown two sheets of photographs. In fact, he was shown one, and under those circumstances, he identified Michael Hutchins. He was never shown a live line-up.

THE COURT: At trial he identified him again?

MR. SCHERKER: Naturally. And I don't know how much weight a jury is going to give that kind of identification. I usually don't expect someone to identify somebody else in the courtroom besides the individual that is sitting next to the attorney.

Of course, his identification is readily subject to challenge as of course he's going to identify Mr. Hutchins when he first sees him under these conditions.

But this individual, Mr. Lewis, who also picked Mr. Hutchins when faced with a live line-up, did not identify him in a courtroom situation, but a neutral line-up situation, but provided a basis to challenge the initial line-up situation.

THE COURT: As opposed to the manner in which

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Mr. Hutchins was not identified by Mr. Lewis.

Now, the only evidence of guilt was Mr. Preston's testimony. There was no corroborating evidence. There was no fingerprints that were taken of Mr. Hutchins at trial. The identification as I've said while certainly legally sufficient evidence of guilt, was not overwhelming evidence of guilt, particularly, in light of the circumstances under which the initial identification was made.

You say that given the Williams rule and the fact of Florida law now and since, established its reciprocity? Then, the Constitution is a matter of an equal protection clause that requires that a defendant be permitted, under appropriate circumstances, the offer which was made at that trial.

MR. SCHERKER: No.

THE COURT: What was the federal constitutional compulsion for the admission of that evidence which was excluded?

A mere State error would have sufficed.

MR. SCHERKER: It's relevant evidence. Other courts besides Florida, including the federal courts, have uniformly recognized that it's relevant evidence. Had Florida never expressed it one way or the other, it's true on this rule it would still be relevant evidence.

The federal court has a right to independently

conclude that relatively independent.

If Florida barred him then, we would be litigating the rule under Spencer vs. Texas. We're not litigating that. We're universally recognized as relevant evidence. Florida recognized it as relevant evidence. Florida did not let Michael Hutchins present it at trial. That's a --

THE COURT: Relevant evidence cannot be excluded without violating the compulsory process clause. The fact that Florida allows it into evidence only means that we're not arguing here or quibbling about Constitutionalizing rules of evidence or any arguments of that nature.

If Florida had a different rule, then, federal court, if it found that rule reasonable, might not be entitled to interfere with the State prosecution. That's again a totally different issue.

Florida recognized that any evidence which proves innocence, however indirectly, is admissible, unless it can be found to be harmless error because of overwhelming evidence of guilt.

This is a Constitutional violation provision to the second issue: The confrontation clause restricts the restriction of hearsay evidence and out of court statements of the State court.

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Mr. Scherker, what I propose to do on the second issue is let the State argue for a moment including such points as it wishes, to reserve you a few minutes if it should prove necessary and let them try to carry the burden on them. Because I'm skeptical on the first point, perhaps more so than I ought to be, and relatively persuaded on the second.

MR. SCHERKER: Thank you, Judge.

MS. HERSHOFF: May it please the Court, Penny Hershoff, Assistant Attorney General.

I understand the Court from hearing your comments before, is in agreement with the Petitioner on our argument that the second claim, the claim about the confrontation clause, has not been waived or alternative has been exhausted?

THE COURT: Well, I start with the proposition that it seems to me that the essence was argued to the Third District Court of Appeals back in 1976.

If that is not so, Mr. Scherker, it seems to me, makes a persuasive case that if the claim which Mr. Hutchins unsuccessfully asserted that to the Third District, was sufficiently distinct from the one which he now makes, then, it would appear to me, though I don't think that's so, then, it would appear to me that the State has waived that by its motion prior to

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this month and several habeas corpus proceedings and alternatively by Judge Rutger's order.

MS. HERSHOFF: If I address, initially, Your Honor as far as the exhaustion part, and I first got this case -- I don't mean to claim ignorance -- but I had just started with this office, to be honest with Your Honor, I had maybe an erroneous concession that had been exhausted.

THE COURT: I'm not sure it was erroneous.

MS. HERSHOFF: Only erroneous if this Court finds this has not been waived.

My initial argument is it has been waived, therefore, it has been exhausted. The State's position is that the Defendant cannot go back on Rule 3.850 and raise his claim because in Florida courts those claims that have been brought on direct appeal cannot be raised on a motion to vacate.

THE COURT: Starting with the proposition that it appears to me that, in fact, the same count appears now raised by Mr. Hutchins. I reread a number of times the six or seven pages by which that point two is raised in 1976 before the Third District. It's very clear.

The Third District had before it certain of the Public Defenders that the State had been permitted

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by the State trial judge to persuade a jury of the Defendant's guilt by repeated reference to the young black man in pointing out the complicity of the Defendant.

The closing remarks of the Third District, the Defendant's reply case. What he was arguing was, in fact, after the proseuutor made comments on the evidence that that was not before the jury impermissible because he states how the prosecutor made a comment that you should look beyond what's before the jury. This is the tip of the iceberg. You should consider other things.

So, what he's arguing is two different things. The Third District, he's saying that the prosecutor is arguing things that were not before the jury. Now, he's saying no, the jury has got to hear that type of evidence.

THE COURT: They're awfully close.

MS. HERSHOFF: Different Constitutional claims.

The first claim is a Fifth Amendment due process claim, the right to a fair trial. All the cases he cites, all the prosecutorial comments.

THE COURT: During the course of trial, the Defendant objected to the reference of a young black male and made three motions for a mistrial.

The brief at the bottom of 21. No, I just -- save your breath. I tell you very flatly, I find that

this was before the Third District Court of Appeals and I find that the State has waived the opportunity to say that it was not.

And, therefore, I will tell you now that I find for Mr. Hutchins and against the State on the grounds of waiver exhaustion or the like, and that the claim is ripe.

Let's proceed to the merits.

MS. HERSHOFF: Just for the record, the State objects to those findings on all counts.

THE COURT: Let's go to the merits.

MS. HERSHOFF: On the merits on the first issue on the exclusion of the testimony of Mr. Lewis, it's the State's position, as it was before the Third District, and perhaps a little different before it was a trial court, was that the testimony of Mr. Lewis would not be relevant and material to the defense of this case.

The testimony if you read the deposition --

THE COURT: You say it had no probative value?

MS. HERSHOFF: Absolutely. If you read carefully the deposition of Mr. Lewis, which was referred to in the trial court, so, it's part of the record in the trial court. It was part of the record in the Appellate Court.

It clearly shows that what Mr. Lewis was not

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able to identify anybody who committed the crime; that he stated, as I quote in my response, in his deposition when they talked about the photographic identification where he supposedly identified the Defendant, he says --

The question was to him, "Did you identify any of the people on that sheet of paper which were comprised of photographs?"

"Answer. Well, I pointed one out who I thought it might be, but it wasn't the right one."

Then at the line-up he testifies:

"Q Did you pick out two people in the line-up as being --"

"I said yeah, it looked like one of those two, but it wasn't, wasn't either one of those two."

"Q When you said one of the two men you identified in the line-up was the man that robbed you. That's what you actually thought at the line-up?"

"A That's what I thought."

Then, he said that he was told later by a detective that it wasn't a correct one. He had pointed out two different people.

He also stated that, "The man that robbed you

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on that occasion in June, have you seen him since the line-up?"

He goes, "Well, he was in the line-up, but I didn't recognize him. So, I saw him, but I didn't know it was him."

The whole thing gives you the idea.

THE COURT: Clearly in his deposition he was an uncertain witness, but taking the extracts which I just now read or paraphrased to be consistent with the reconstruction which Mr. Scherker has argued. That the witness initially identified Mr. Hutchins and then says that he thereafter came to recognize that was erroneous and at the line-up identified it as being one of several other people.

Thereafter, perhaps, did not know who it was.

MS. HERSHOFF: Your Honor, basically, the point is that he was not able to specifically say the Defendant wasn't the one who did it. It's the State's position that at that point, he became so confused he didn't know who did it, that very possibly that if he had put him on the stand that first conjecture of what happened would have happened --

THE COURT: It's not Mr. Scherker's fault. He sought to put him on the stand, or rather a colleague in the Public Defender's Office.

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MS. HERSHOFF: That's correct. It's the State's position and the Respondent's position that this evidence would not have shown directly or circumstantially that another person had committed the crime.

It was quite different from cases cited by the Defendant.

Holt vs. U.S., U.S. vs. Robinson, U.S. vs. Armstrong which in those cases you had specific testimony that would have, for instance, in Holt would have positively shown that the defendant had been mistakingly identified.

In two similar cases he was able to provide an alibi. Beyond a reasonable doubt in one of the other cases. You don't have that here.

THE COURT: The crimes are remarkably similar.

MS. HERSHOFF: There are definitely distinctions here too.

THE COURT: In the offense?

MS. HERSHOFF: Yes, sir.

THE COURT: What are the distinctions?

MS. HERSHOFF: The distinctions in this particular case, you have the victim in this case, Mr. Preston, testifying that an assailant was a young black male with braided hair who told during the ride from the VA Hospital to 22nd Avenue his problems with his VA and

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how he wasn't getting it.

He had a conversation with him for fifteen minutes and that he was, in fact, Mr. Preston was not stabbed with a butcher knife.

After that, he was stabbed. When Mr. Preston, the victim, got out of his car, the Defendant or who he identified as the Defendant, came over and his money fell out and he picked up the money and ran.

Mr. Lewis testified that the assailant had a regular haircut, was closely cropped hair, that the assailant announced this was a stick-up which didn't happen in the second case.

And then, pulls out the jack-knife, not the butcher knife, a smaller knife. He did not stab Mr. Lewis. He didn't make an attempt to stab Mr. Lewis.

He asked him for the money. He took the changer that was in the cab. Then, when Mr. Lewis jumped out of the car, the assailant jumped out of the car. Then, Mr. Lewis jumped back in the car and was able to drive off.

I think those are big differences. When I argue here whether or not the State could have got it in, perhaps, I don't think they could have.

Let's say if Mr. Lewis had identified the Defendant as being the perpetrator of the second act.

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I think the defense would have a good argument to the effect that these were distinct crimes. They were distinct crimes.

There were too many holes to bring in a modis operandi and under the Florida Williams rule type evidence, it was irrelevant. It was not probative.

The key is that Mr. Lewis could not identify the Defendant as not being the person or could not identify somebody else as definitely being the person who robbed him. That's a big difference between all the cases cited by the Petitioner where you have definite direct evidence or very strong circumstantial evidence.

For instance, in one of the cases you had in which the third person was found with bate money after the robbery. That's direct evidence to show that this other person committed the robbery. You don't have that here either.

It's the State's position again that --

THE COURT: Let me just ask, before we go on to the second point, let me ask you these questions.

The Public Defender is permitted to call Mr. Lewis and the following occurs:

"Were you asked by a young black male of approximately -- physical descriptions -- to drive from the VA Hospital to 61st Street

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and 21st Avenue, on that night?"

"A. Yes."

"Q. During that ride, were you accosted with a knife and robbed?"

"A. Yes."

"Q. Were you thereafter shown what you now know to have been a picture of the present Defendant, Mr. Hutchins? Did you at that time identify him as the man who had robbed you?"

"A. Yes."

"Q. Did you come to recognize thereafter that your identification was a mistake?"

"A. Yes.

MS. HERSHOFF: Your question, Your Honor?

THE COURT: Counsel says that under reverse Williams, that is probative evidence which a jury could choose to credit as tending to exculpate the defendant on the crime charged just as if the answer had been, "Yes, I identified him as I continued to believe that he was the person we were awaiting trial on this case." What have you.

The State would offer that as evidence of similar acts.

MS. HERSHOFF: It is the State's position, initially,

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that number one, that proffer that Your Honor has just stated would not be enough for a Williams modis operandi exception which requires some sort of hallmark in identifying some sort of unique feature. That is our initial position.

THE COURT: Robbing a cab driver by threatening with a knife or use of a knife on the run between the same locations.

MS. HERSHOFF: Unfortunately, in Dade County as I believe Mr. Preston, the victim in this case testifies that he had been robbed and stabbed before.

THE COURT: Yes.

MS. HERSHOFF: It's obviously not that unusual, unfortunately, in Dade County and on the run to the VA Hospital or that area of town, for that to happen.

As I said, it's unfortunate. I don't think it would bring up under the Williams rule.

The State submits that Mr. Lewis' testimony was not that clear and not probative because he would not be able to specifically have said the Defendant did not do it. And would not have been able to point out anybody as being the person. He just didn't know who did it.

There was certainly cause to think if he had gotten up on the stand, unfortunately, it may be

Mr. Hutchins was the one who did it.

THE COURT: I am not at this time persuaded by Mr. Scherker's argument, although I am closer to that point than I was before this afternoon.

Tell me about the other point which I must tell you I find at the moment arresting, that's the continual reference by Detective Shipes and the other police officer at the permission of the court, that continuing reference by the police officers and the repeat reference by the prosecutor to the assistance which had been furnished the police by a young black male who obviously had purported pointed out to the arresting officers the person whom they should investigate and arrest.

And because they had promised him anonymity would not be identified and was never produced. I really think it extraordinary that a trial court allowed the recitations which the record demonstrates to go to the jury.

So, it dissuades me from that one.

MS. HERSHOFF: Initially, Your Honor, I don't think we should blame the trial court because at the time of the trial that type of evidence was not considered hearsay.

And under Florida law, two cases I've cited,

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Collins vs. State, 65 So. 2d, 61 and Kirby vs. State which is 44 Florida 2d, 81 Southern, 836, which clearly states that it was proper for an officer to testify what he did pursuant to information, but could not relate the information itself because that was hearsay.

In this case none of the officers testified to any statements that this unknown black male said, It was just that we talked.

As a result, we did so and so.

The State recognizes it now under a Potelle (phonetic) Case which has come down from the Third District cited by Petitioner in his brief, that would be hearsay.

But at the time of this trial in 1976, it was not hearsay. It was not recognized as hearsay in the State of Florida.

I think it has to be taken into consideration the trial court's ruling. I don't think the trial court would be able to proceed six or seven years later. The Third District would change its mind. Perhaps, they shouldn't be because the Florida Supreme Court cases.

I say the Potelle Case law is the law now. It was not the law in Florida at the time of the trial. I don't think the trial court should be faulted.

THE COURT: I'm concerned with the confrontation law

which was on the law in 1976.

MS. HERSHOFF: That's correct. To be perfectly honest with you, Your Honor, from my memorandum, I did not go that much into merits on this.

THE COURT: You suggested in the most recent memorandum that viewed now in retrospect it was an erroneous equivalent of hearsay, but you suggest that it did not raise to the level, the constitutional level, under California vs. Green and other cases.

MS. HERSHOFF: That is our position. One of the factors that the Fifth Circuit in Favre vs. Henderson, 464 F. 2d, 359 cited by the Petitioner, which was based on Gutton vs. Evans, 400 US. 74, 91 Supreme Court, 200, you look at different factors to determine testimony, hearsay testimony violation.

One of those is the defendant has the ability to subpoena this confidential informant or this person to trial.

THE COURT: How do you apply that test here?

MS. HERSHOFF: It's the State's position, as the record shows, even though there was photographs at a pre-trial hearing, sometime during the volunteering, I believe it was in there, one of the circuit courts said that they could not get the name of the informant, however, there was a trial court in this case.

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Judge Nesbitt specifically said and the State said if you had tried the motion and you had ordered us, we would have considered having the police officer divulge that information, that then you would have deposed him, could have brought him to trial, you could have confronted him.

THE COURT: How was the defendant to know whether the pre-trial ruling was to the contrary and whether the representation by the prosecutor to Judge Nesbitt was that the police officer had promised anonymity to this assailant and according to the prosecutor, had told him flatly or her, as the case may be, that under no circumstances would they ever disclose the name?

MS. HERSHOFF: Because, Your Honor, what had happened at the pre-trial was a different trial judge then the judge that heard the trial.

I don't know whether defense counsel was precluded from at least trying to get that name that whether or not a police officer would have risked contempt and put him in jail for this unknown black informant. We don't know.

But I think the point is he didn't try. That's what the court based its ruling on.

THE COURT: It even appeared to me in reviewing through the trial record that the prosecutor had violated

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whatever degree of rest
to place on the prosecu
be made of this evidenc
Every time de
trial judge said to the
stop violating my earli
for a mistrial and view
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final argument.
MS. HERSHOFF: You
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District Court of Appea
tly for whatever their
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denying the mistrial.
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which is not reversible
THE COURT: Obviou
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MS. HERSHOFF: 'I t
I think we have your --
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efense counsel objected, the
e prosecutor, "You're obligated to
ier restriction." Denied motions
wed in that way, the violation
he trial, including the time of

ur Honor, the only answer I can
as brought before the Third
als and they considered that apparen
reason in the DCA affirmance
e trial court was correct in not
That was one of the issues brought
his brief.
you have a presumption that the
their rules has a re-reversal
e error.
usly, the determination in the
hat may or may not be the rules
right?
understand that, Your Honor, but
- it's one thing when we're
trial court error. There were

other courts that upheld the trial court back in 1976, I think. The law has perhaps evolved a little bit different up to now. It was not perhaps as strong as it was back there.

Favre vs. Henderson was on the books at that time. That was to the Third District. Favre vs. Henderson was not cited by the defendant in his brief in any part to the Third District.

Perhaps if it had b en cited we would have a confrontation clause. I won't get into that.

THE COURT: I simply have found against you on those arguments.

MS. HERSHOFF: It is the State's position that the testimony of the witness in this case was sufficiently- was overwhelming. I understand the Defendant does not agree with that. We think that the --

THE COURT: Let me hear from Mr. Sherker on that.

Your argument, even if this is error, this was reversible error? It's not Constitution magnitude because the evidence of guilt established through the jury's opportunity to believe the cab driver was sufficient to convict.

If that evidence was as strong as you characterize it to have been, it's a shame that the procedures were tainted by the repeated reference to the nameless

accuser. Nameless accusers don't have an appropriate rule under the confrontation clause.

Let me hear Mr. Scherker on your last point.

MS. HERSHOFF: Thank you, Your Honor.

MR. SCHERKER: Judge, I believe the question of prejudicial error is answered by Favre itself.

In that case there were --

THE COURT: By which Favre?

MR. SCHERKER: Favre vs. Henderson, the decision upon which we primarily rely and which holds that any distinct decision, distinct action between throughout the essence and actuality.

THE COURT: I don't have any problem with that. It's clear that the jury was asked by the prosecutor to believe that the officer had been accurately assisted by an informant who knew the guilt of the defendant, but did not want himself to be disclosed.

I don't have any problem with that.

MR. SCHERKER: Favre also addresses the issue of harmless error.

THE COURT: Let's look to that.

MR. SCHERKER: In Favre, there were four witnesses who saw the robbery, all of whom identified the defendant in a police line-up fifteen days after the robbery.

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It was argued at trial that there was some doubt about the validity of the line-up identification. That's apparently argument of counsel about the placement of the line-up.

At trial, one of the witnesses said he could not make a positive identification, but thought the defendant was the robber. Another witness made a positive identification. Another witness said he couldn't say. He made an identification at trial, but he couldn't see his face completely to make a real positive identification. And the fourth witness said she saw the robber's face completely at the time of the incident. Saw his face perfect and identified the defendant as the robber without doubt.

Those were the facts in Favre vs. Henderson. That was the State's evidence in Favre vs. Henderson. What the court held is that, "Considering the disputed testimony in context, we cannot conclude that its admission was harmless beyond a reasonable doubt. The testimony with its inference on the issues of identification and guilt --" the same inference we have in this case -- "may well have tipped the scales towards a guilty verdict. Without, the disputed testimony, the prosecution had a questionable case --"

But is that true here?

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MR. SCHERKER: Judge, if one positive identification is not overwhelming evidence, they had one undisputed, unshaken positive identification.

In Favre vs. Henderson, three corroborating identifications.

THE COURT: In this case, how shaky is the case without reference to --

MR. SCHERKER: I go back to the time of the initial identification. It's well known that the first identification of the individual is of primary importance in subsequent identifications.

The first identification of Michael Hutchins was made under terms at least questionable and, perhaps, stated more strongly, highly suspect circumstances.

The individual was in a hospital, had been severely injured, was under sedation, thought he saw two sheets of photographs which, in fact, he saw one.

Thereafter, continued to identify Michael Hutchins every time he came to court, providing a very strong basis for the argument that he was wrong at the time and that he naturally stuck to that identification.

If there had been one eyewitness, one strong eyewitness identification, one positive eyewitness identification, Favre vs. Henderson would have gone the other way and it didn't.

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What they held was with the disputed testimony, the prosecution's case was far stronger and the test, of course, is harmless beyond a reasonable doubt. There was no doubt that the prosecution's case was far stronger, based on his ability to argue to the jury unchecked that Michael Hutchins was essentially identified by this unknown witness.

Now, what the prosecutor tells the jury -- I'm referring to his closing argument -- if that was even necessary, but the police officers were allowed to testify to what this unnamed person who took them to 1840 Northwest 60th Street and then, they went and made up an investigation. And then, they got the photographic identification and Michael Hutchins was identified from that photographic identification.

And then, they went and arrested Mr. Michael Hutchins.

Where did they arrest Michael Hutchins? At the same address, 1840 Northwest 60th Street.

We submit if there was any question of harmless error, it's obviously vacated by the facts of the case, the fact of the crime itself, the fact that the witness' identification and by the prosecutor's argument.

If the prosecutor didn't draw those inferences

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for the jury, they might have been able to argue, well, it's kind of unclear from the record, the jury might have gone right by it.

But what did the prosecutor do in his closing argument? Then, afterwards, the detective got out a warrant and went to the State Attorney's Office and went to the judge and got a warrant for Michael Hutchins' address. Went back to that address and where was the address? 1840 Northwest 60th Street.

It was at that point that the prosecutor continued by telling the jury that they were only hearing the tip of the iceberg and urged them not only to rely on what you heard here, but to consider all the evidence and circumstances involved in this crime.

THE COURT: That was a very unfortunate allusion.

MR. SCHERKER: The prosecutor didn't think his case was as strong as the State says it is today under that one identification made under circumstances that were subject to question by a reasonable jury.

That, as I said, in Favre vs. Henderson, we have none of these factors. In Favre vs. Henderson, we have just the testimony of numerous witnesses with varying degrees of certainty. One who is absolutely positive. What I draw from that one positive ID is not overwhelming evidence. There is no corroborating

evidence whatsoever in this case.

Urged the jury to convict on testimony which could not be cross examined on, a witness who could not be confronted is prejudicial error and it does warrant issuing a writ.

THE COURT: I find that the State's claim now that the question we have just been considering is not before the Court.

As I've said earlier, I reject it. I find that it is -- I'm not certain with regard to what we can characterize as the reverse Williams argument. I find that the repeated reference before the jury to a person not particularized so that the defense might have called him or confronted him, if called, was error.

I'm not certain whether it was error that requires now a new trial or discharged under constitutional standards. I'm uncertain because of the State's argument that this is a case in which all of those references may be deleted from the record and there is sufficient and untainted evidence to support the conviction.

That is to say, the testimony of the cab driver.

If the State wants to file anything with me in the next fifteen days on that point. Counsel may feel that the matter has been briefed and memoed sufficiently. I don't want to suggest that that's not so.

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I'm not suggesting that these issues have not received a lot of attention from counsel.

If the State wants to file anything on that point, it may do so within the next fifteen days, which would put us essentially in the middle of December.

If you want to respond on that point, only do so full within say the following twenty days.

MR. SCHERKER: Yes, sir.

THE COURT: Which would put us approximately to the 5th of January. And I will publish my findings, recommendations to the District Court as soon thereafter as I can. I want to thank counsel for assisting me, in particular Mr. Scherker for having accepted a reappearance on behalf of Mr. Hutchins.

MR. SCHERKER: Thank you, Judge.

(Thereupon, the hearing was concluded.)

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CERTIFICATE

STATE OF FLORIDA)

COUNTY OF DADE)

I, Leslie Walls, Court Reporter and Notary Public in and for the State of Florida at Large, do hereby certify that the foregoing transcript, pages 1 through 44, is a true and correct transcript of the proceedings had in the above cause of MICHAEL HUTCHINS vs. LOUIE L. WAINWRIGHT, Case 82-0420 CWJE, heard before the Honorable Peter L. Nemkoff, on November 29th, 1982.

Dated at Miami, Dade County, Florida, this 22 day of December, 1982.

Leslie Walls

My Commission Expires 3/4/83

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ARGUMENT

I

THE DISTRICT COURT ERRED IN FINDING THAT THE RESPONDENT WAS ESTOPPED FROM SEEKING DISMISSAL OF THE PETITION FOR WRIT OF HABEAS CORPUS ON THE GROUNDS OF RES JUDICATA, EQUITABLE ESTOPPEL, AND WAIVER.

In his petition for writ of habeas corpus filed in 1978, among the grounds alleged by the Petitioner was that his conviction was "obtained by the unconstitutional act of letting hearsay evidence in favorable only to the prosecution by the court," "where the witness said that he returned to car, and there was a piece of paper in that car with some writing on it and that when he got back to the office, he made a phone call to another person and this person told him something and then took him to 1840 N.W. 60th Street, the defendant's home. When none of this can be said really happened." See Exhibit "C" at p.5. The district court, held that the Petitioner had raised the substantial equivalent on this issue on direct appeal to the Third District Court of Appeal of Florida. However, because, the petition contained clearly unexhausted claims, the petition was dismissed without prejudice so that the Petitioner could exhaust his state remedies.

In the present Petition for Writ of Habeas Corpus, the Petitioner alleged as his second ground for relief that his "conviction was obtained by the unconstitutional act of allowing 'hearsay evidence' to be admissible," "where witness said that he was told by some 'unknown person' to the prosecutor or defense something" and this person left a note, none of this was or can be proved as fact." (R.5). In its initial motion to dismiss, the respondent, initially conceded that this claim had been presented to and rejected by the Florida appellate court, but submitted that the petition should again be dismissed because it contained other unexhausted claims. Soon, thereafter, upon order by the Magistrate (R.23), counsel for the Petitioner entered his appearance, filed a Notice of Election of Remedies, and revised the claim into constitutional terms to state "the admission into evidence of the substance of incriminatory out-of-court statements attributed to an unnamed and undisclosed informant violated the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States." (R.27-34).

After being allowed to file a memorandum on the merits of the remaining claims, the Respondent realized that he had erroneously conceded that the confrontation clause claim had been previously presented to the state appellate court. In

order to correct the error, the Respondent, in his responsive memorandum filed on November 22, 1982, alleged that the confrontation clause claim had not been fairly presented to the state courts and because it could probably not be raised in a state motion for post-conviction relief, it was waived pursuant to Engle v. Isaac, supra and Wainwright v. Sykes, supra. However, the Respondent noted that if it was possible for the Petitioner to raise this claim in the state courts, then he has not exhausted his state remedies, and the state courts should be given an opportunity to apply the controlling legal principles.

At the oral argument on November 29, 1982, counsel for the Respondent attempted to explain the reasons for not initially raising the procedural issues, and again asserted that the Petitioner had raised a Fifth Amendment, due process claim, the right to a fair trial, and not a Sixth Amendment, confrontation clause claim in his direct appeal to the State appellate court. The Magistrate then decided that the claim was properly before him, stating in his written report that the Respondent was estopped from asserting its procedural claims under the doctrines of res judicata, equitable estoppel and waiver, and further that the confrontation clause claim had been substantially presented to the state appellate court. Because the district court adopted the Magistrate's report, these

findings, will now be discussed in terms of the district court's findings.

Respondent's submits that the district court's findings of collateral and equitable estoppel are without reason or legal support. It is well established that the principles of res judicata and collateral estoppel are inapplicable to habeas corpus proceedings. Smith v. Yeager, 393 U.S. 122, 124 (1968); Thomas v. Dietz, 518 F.Supp. 794, 799 (D.N.J. 1981). The instant case does not involve double jeopardy principles as was involved in Ashe v. Swenson, 397 U.S. 436 (1970), Johnson v. Estelle, 506 F.2d 347 (5th Cir. 1975) or McDonald v. Wainwright, 493 F.2d 204 (5th Cir. 1974) cited in the Magistrate's report. Rather, the issue is whether the order by the district court in the first petition constituted a final judicial determination which would preclude the Respondent from raising the procedural issues.

Respondent submits that the district court's order in the first petition was not a final order that would be res judicata and preclude the Respondent from raising the procedural issues before this Court. The order was not a final order unless it was one that could be appealed. 28 U.S.C. §2253 provides that only final orders are subject to review on appeal. A final decision generally is one which ends litigation on the merits and leaves nothing for the

court to do but execute the judgment. Catlin v. United States, 324 U.S. 229 (1945). An order contemplating further proceedings in the lower court is not final, regardless of the form in which it is rendered. Smith v. Sherman, 349 F.2d 547, 552 (8th Cir. 1965).

To determine whether the district court's order in the first petition was appealable, so as to estop the Respondent from raising its procedural arguments, the Respondent asserts that this Court must look to the Federal Rules of Civil Procedure. Rule 81(a)(2) of the Federal Rules of Civil Procedure are applicable to habeas corpus proceedings to the extent that the practice in such proceedings is not set forth in the statutes of the United States and has heretofore conformed to the practice in civil actions. Under Rule 54(b) of the Federal Rules of Civil Procedure, when more than one claim for relief is presented in an action, the court may direct the entry of a final judgment as to one or more but fewer than all claims only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment. In the absence of such a determination and direction, the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all parties. (Emphasis added). Thus, under the express terms of the rule, a

decision which adjudicates less than all of the claims does not terminate the action as to any claim and the order is subject to revision at any time before the adjudication of all claims. Stewart v. Bishop, 403 F.2d 674, 680 (8th Cir. 1968).

In Collins v. Miller, 252 U.S. 364 (1920), the Supreme Court held that a habeas corpus appeal lies only from a final judgment. The Court held that a trial court's order that a petitioner's habeas corpus petition should be denied on one of the claims, but the other two claims were to be remanded for further hearing, was not a final decision, and hence unappealable. The Court stated:

> "A case may not be brought here by appeal or writ of error in fragments. To be appealable the judgment must be not only final but complete.
>
> * * *
>
> And the rule requires that the judgment to be appealable should be final not only as to all parties but as to the whole-subject matter and as to all the causes of action involved.
>
> * * *
>
> Only one branch of the case has been finally disposed of below, therefore none of it is ripe for review by this court."
>
> 252 U.S. at 370, 371.

Respondent submits that because the first petition had multiple claims and was dismissed without prejudice,[5] it was not a final judgment that could be appealed by the Respondent under 28 U.S.C. §2253. Thus, the Respondent should not be collaterally estopped from raising the procedural issues in the instant petitions.[6] See, e.g., Garcia v. United States Board of Parole, 557 F.2d 100, 104 (7th Cir. 1977); Watts v. United States, 402 F.2d 676, 685-86 (D.C. Cir. 1968) rev'd on other grounds 394 U.S. 705 (1969).

In addition, it is illogical to require the respondent who has received a favorable disposition, that is, a dismissal without prejudice, of the petition, to waste the appellate court's time, to appeal one issue of a multi-issue petition. This is especially true, where the dismissal was without prejudice, allowing the petitioner to refile and reallege the same claims. The interests of judicial economy would be greatly disserved by requiring the respondent in a habeas corpus case to appeal orders dismissing the petition without prejudice, or be collaterally estopped from raising procedural issues in a subsequent petition.

[5]It can hardly be said that it is equitable for only the Respondent to be subject to prejudice and the Petitioner.

[6]It should also be noted that the district court has treated the instant petition as a separate and distinct case. This is evidenced by the different case numbers and different judges.

Respondent also objects to the district court's finding that the Respondent is equitably estopped from raising his procedural claims on the grounds that the Petitioner justifiably and detrimentally relied upon the Respondent's initial concession. Respondent submits that any unexhausted claims which Petitioner abandoned can be reinstated. Thus, Petitioner would have suffered no detrimental reliance. However, the Petitioner would again have a mixed petition of exhausted and nonexhausted claims and the petition would have to be dismissed again without prejudice. Rose v. Lundy, ___U.S.___, 102 S.Ct. 1198, 1199 (1982); Galtieri v. Wainwright, 545 F.2d 942 (5th Cir. 1977).

Respondent would also submit that although a custodian in a habeas corpus proceeding may be held to have waived procedural objections to the consideration on merits, Felder v. Estelle, 693 F.2d 549 (5th Cir. 1982); Lamb v. Jernigan, 683 F.2d 1332 (11th Cir. 1982); Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), waiver is not applicable in the instant case. Respondent has raised the procedural issue before the Magistrate, the Petitioner was given an opportunity to respond (See Transcript of Hearing at 5-14; R.87-131, and the Respondent objected to the Magistrate's finding that the merits of the petition were properly before him. This is not a case where the Respondent has raised the procedural issues for the first time on appeal, Messelt v.

Alabama, 595 F.2d 247 (5th Cir. 1979), nor has there been a great deal of expenditure of federal judicial resources. Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978). Rather, the Respondent has timely raised the procedural issues, and has not waived those arguments. See, e.g. Hopkins v. Jarvis, 613 F.2d 568, 570 n.2 (5th Cir. 1981); Bufalino v. Reno, 613 F.2d 568, 570 n.2 (5th Cir. 1980). Respondent asserts that the district court's reliance on LaRoche v. Wainwright, 599 F.2d 722 (5th Cir. 1979) as support for its finding that the respondent has waived his procedural claims is misplaced. Rather, LaRoche supports the Respondent's position that he is not barred by waiver or estoppel from raising the procedural issues. In LaRoche, the court held:

> We need not reach the state's procedural arguments because they have been waived here by the failure to raise them, either in the first federal habeas proceeding that was dismissed for failure to exhaust state remedies or in the second habeas proceeding below, after LaRoche had been denied relief by state courts. 599 F.2d at 724.

Although, the Respondent failed to raise the procedural issues in the first federal habeas proceeding that was dismissed for failure to exhaust state remedies, Respondent has raised the procedural issues in the present habeas proceeding. Therefore, under LaRoche, Respondent is not estopped and has not waived his right to raise those pro-

cedural issues in the present petition. Thus, the Respondent submits, the district court erred in finding that the Respondent was estopped from seeking dismissal of the petition for writ of habeas corpus on the grounds of res judicata, equitable estoppel, and waiver.

II.

THE DISTRICT COURT ERRED IN FINDING THAT THE PETITIONER'S CONFRONTATION CLAUSE CLAIM HAD BEEN SUFFICIENTLY PRESENTED TO THE STATE APPELLATE COURTS, WHERE THE CLAIM WAS PRESENTED IN ONLY STATE TERMS, AND WAS FRAMED IN TERMS OF PREJUDICIAL PROSECUTORIAL COMMENTS, AND NOT IN TERMS OF A SIXTH AMENDMENT CONFRONTATION CLAUSE VIOLATION.

The Respondent strenously submits that the district court erred in finding that the substantial equivalent of the confrontation claim was presented to the state appellate courts. Because the state appellate opinion was a per curiam affirmance without a written opinion, Hutchins v. State, 349 So.2d 1237 (Fla. 3d DCA 1977), this Court must look to the state appellate briefs to determine whether the substantial equivalent of the confrontation claim was presented. The issue on direct appeal was framed as follows:

> Whether the trial court erred in allowing prosecutorial comments regarding the investigating officers' encounters with an unidentified third person to pervade the entire trial, where the only purpose of this argument was to lead the jury to draw the impermissible inference that this third person had identified the defendant as the perpetrator of the charged crime, but was afraid to testify in court.
>
> See Exhibit "A", Point II on Appeal, at 11.

In support of this allegation of error, the Petitioner cited state cases that admonished prosecutors from making comments that could not be reasonably inferred from the evidence or which was inflammatory and calculated to raise passion or prejudice in the minds of the jury. See Exhibit "A", Brief of Appellant at 22-24. None of these cases contained any reference to any confrontation clause claims.[7]

It is obvious that the actual gist of Petitioner's allegation of error was that the prosecutor's arguments were based on evidence not before the court at all and if it was

[7]Adams v. State, 192 So.2d 762 (Fla. 1966)(comments by prosecution that equated victim of homicide to wives and relatives of jurors, and that defense counsel's statements "perverted and distorted things" and "violated his oath as a lawyer and human being "were unduly prejudicial and constituted error); Goddard v. State, 143 Fla. 28, 196 So. 596 (1940)(prosecutor's statements that defendant was "low down scoundrel" and "skunk" and there has never been an ounce of remorse in the "no good black heart of that scondrel"; although improper, held not reversible in light of overwhelming evidence); Johnson v. State, 88 Fla. 461, 102 So. 549 (1924)(prosecutor's reference to the defendant that he "went out there for what cats and dogs fight for," and "is a brute", were reversible error); Richardson v. State, 335 So.2d 835 (Fla. 4th DCA 1976)(prosecutor's remarks that he "could have brought in a lot of police officers" and that case could have lasted longer constituted reversible error); James v. State, 334 So.2d 83 (Fla. 3d DCA 1976)(prosecutor's remark that pushers infest other individuals with his disease of heroin although improper, was not so prejudicial as to require a mistrial); Silvestri v. State, 332 So.2d 351 (Fla. 4th DCA 1976)(prosecutor's remark that the state's key witnesses were "obviously able to convince the police of their truthfulness or they would have been the ones on trial was prejudicial error); Thompson v. State, 318 So.2d 549 (Fla. 4th DCA 1975)(prosecutor's comment, concerning additional witnesses who could of been called were prejudicial in that they lead the jury to believe that there was other evidence).

a constitutional violation, it was a violation of his rights not to be deprived of life, liberty or property, without due process of law under the Fifth Amendment of the United States Constitution. This can be determined by reviewing the portions of the prosecutor's arguments emphasized by the Petitioner in his brief. The Petitioner was especially concerned with the prosecutor's explanation as to why the young black male did not testify, and his request to the jury to not only rely on what they heard, but to consider all the circumstances. See Exhibit "A", Appellant's brief at 21, 23. Respondent submits that if the Petitioner had intended to raise the issue in terms of a confrontation clause violation, he most certainly would have done so. Petitioner was able to frame his first issue on appeal, that the trial court erred in excluding a defense witness, as a basis for a violation of the Petitioner's due process right to prepare and present a defense under the Sixth and Fourteenth Amendments to the United States Constitution. See Exhibit "A", Appellant's Brief at 12.

Further evidence that the Petitioner did not raise the substantial equivalent of a confrontation claim in the state appellate court, is found by reviewing the state's brief. The state argued in its brief that the prosecutor properly argued the facts which were established at trial and which were reasonably inferred from the facts established. The

state cited to the portions in the transcript in which the two officers testified about their contact with the young black male. See Exhibit "B", Appellee's Brief at 17-20. The state also argued that trial counsel "never moved for a mistrial or asked the trial court to take any action during the prosecuting attorney's argument or at the conclusion thereof" thus, he did not properly preserve his assertions regarding the prosecutorial arguments for appeal. See Exhibit "B", Appellee's Brief at 27. Thus, it is obvious that the state was not put on notice that the Petitioner was raising a violation of the confrontation clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment.

Respondent submits that it is evident that the Petitioner did not raise the substantial equivalent of a confrontation clause claim in the state courts. Although, a hearsay objection may be sufficient to raise a confrontation issue if raised in a confrontation posture, Thomas v. Estelle, 582 F.2d 939 (5th Cir. 1971) such an objection was not presented on the appellate level in the instant case. See Dave v. Attorney General of State of New York, 696 F.2d 186, 193 (2d Cir. 1982)(en banc).

In Thomas v. Estelle, supra, the hearsay objection was made in terms that indicated that the defense counsel wished the witness to be brought down to the courtroom so he could question her. In the instant case, although the Petitioner's trial counsel objected to the testimony on hearsay grounds as well as complaining that he was never given an opportunity to discover the young black male's identity, Petitioner's appellate counsel chose to frame the issue on appeal only in terms of what the prosecutor said concerning the young black male and his reasons for not being a witness, in his closing argument. Not only did Petitioner's appellate counsel not phrase the issue in terms of a confrontation clause violation, he did not even allege that there was a violation of the hearsay rule.[8]

Respondent submits that the district court's finding that the substance of the confrontation claim was presented to the state appellate court is clearly in error. It is well established that under 28 U.S.C. §2254, a federal habeas petitioner is required to have provided that state courts with a "fair opportunity" to apply controlling legal principles to the facts bearing upon his constitutional

[8]This is because at the time of the Petitioner's trial the officers' testimony as to the manner in which they investigated the case, testifying what they did, pursuant to information (not related in court) received from the informant, was permitted in Florida courts as not being hearsay. Collins v. State, 65 So.2d 61 (Fla. 1953); Kirby v. State, 44 Fla. 81, 32 So. 836 (1902).

claim. Picard v. Connor, 404 U.S. 270, 276-277 (1971). Furthermore, the habeas petitioner must have "fairly presented" to the state courts the "substance" of his federal habeas corpus claim. Picard v. Connor, 404 U.S. at 275, 277-278. It is not enough that all facts necessary to support the federal claim were before the state courts or that a somewhat similar state law claim was made. Anderson v. Harless, ___U.S.___, 103 S.Ct. 276, 277 (1982). The argument raised in federal court must be the substantial equivalent of that presented to the state courts "to insure that the 'method of analysis' was "readily available to the state court." Santana v. Felton, 685 F.2d 71, 74 (3d Cir. 1982).

Where a petitioner, on his direct appeal to the state appellate court, presented his claims in state terms only, the petitioner has failed to give the state courts a fair opportunity to consider his federal claims of error. Gulliver v. Dalsheim, 687 F.2d 655, 657 (7th Cir. 1982); Santana v. Fenton, supra; Steele v. Taylor, 684 F.2d 1193, 1206 (6th Cir. 1982); Winfrey v. Maggio, 664 F.2d 550, 553 (5th Cir. 1981); Hart v. Estelle, 634 F.2d 987, 989 (5th Cir. 1981); Thomas v. Wyrick, 622 F.2d 411, 413 (8th Cir. 1980); Conquest v. Mitchell, 618 F.2d 1053, 1056 (4th Cir. 1980); Johnson v. Metz, 609 F.2d 1052, 1054 (2d Cir. 1979).

Alleging lack of a fair trial does not sufficiently alert a state court to a contention that the trial court failed to comport with due process guarantees. Kirksey v. Jones, 673 F.2d 58, 59-60 (2d Cir. 1982); Thomas v. Wyrick, supra at 413; Johnson v. Metz, supra at 1054-1055. A habeas petitioner will not be deemed to have fairly presented his claim to the state courts though the prior state proceedings technically asserted the same constitutional deficieny, the same facts that are urged in the federal court, are used to support of a different legal theory. Hart v. Estelle, supra at 989. See also Picard v. Connor, supra (claim in state court that indictment was amended in such a way as to violate the Fifth Amendment, was not sufficient to apprise the state courts of a violation of the Equal Protection Clause of the Fourteenth Amendment). Furthermore, a defendant's citation to a state court decision predicated solely on state law will not be sufficient to fairly apprise a reviewing court of a potential federal claim merely because the defendant in the cited case advanced a federal claim. Anderson v. Harless, supra, 103 S.Ct. at 278, n.3.

The Respondent submits that where the Petitioner in his brief to the state appellate court presented the facts, but framed the issue on appeal in terms of prejudicial prosecutorial comments, and not in terms of whether the

testimony of the police officers concerning the young black male was hearsay and violated his right to confrontation, or even whether the prosecutors comments by themselves were hearsay or violated the petitioner's right to confrontation, the "substance" of his confrontation claim was not fairly presented to the state courts.

The lack of citation to federal constitutional provisions and federal authority in the Petitioner's appellate brief must be given greater weight by this Court than the district court did. This is because it is well established that because evidence is admitted in violation of the hearsay rule, it does not lead to the automatic conclusion that a defendant's confrontation rights have been violated. California v. Green, 399 U.S. 149, 156 (1970). See also Daye v. Attorney General of State of New York, supra. If Petitioner's state appellate counsel had intended to raise a confrontation claim, he could of cited the two Fifth Circuit cases, United States v. Ragano, 476 F.2d 410 (5th Cir. 1973) and Favre v. Henderson, 464 F.2d 359 (5th Cir.), cert. denied, 409 U.S. 942 (1972), as he did in his memorandum in support of petitioner's writ of habeas corpus. Thus, Respondent objects to the Magistrate's finding that the substantial equivalent of the present confrontation claim was raised in the state appellate court.

Respondent submits that this failure to fairly present this issue to the state courts is not one of non-exhaustion,[9] but rather one of waiver under the doctrine of Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977). In Wainwright, the United States Supreme Court held that, failure to make a timely objection under Florida's contemporaneous objection rule to the admission of his inculpatory statements, absent a showing of cause for the noncompliance with the procedural rule and some showing of actual prejudice, bars federal habeas corpus review of the defendant's Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966) claim. This cause and prejudice requirement of Wainwright v. Sykes, has been extended to include claims which the defendant has failed to include on direct appeal in compliance with state procedural appellate requirements. See, e.g., Wright v. Bombard, 638 F.2d 457 (2d Cir. 1980); Forman v. Smith, 633 F.2d 1055 (4th Cir. 1980); Evans v. Maggio, 557 F.2d 430 (5th Cir. 1977); Cole v. Stevenson, 620 F.2d 430 (5th Cir. 1977); Carter v. Scully, 533 F.Supp. 257 (S.D.N.Y. 1982). Furthermore, issues presented in the state trial court but not presented to the appellate court are

[9]The respondent is asserting that the Petitioner has waived this claim, but if this Court finds there has been no waiver because the Petitioner still has a state remedy, then respondent asserts in the alternative, that this claim is unexhausted. See, e.g. Rose v. Lundy, ___U.S.___, 102 S.Ct. 1198 (1982); Pitchess v. Davis, 421 U.S. 482, 98 S.Ct. 1748 (1975); Picard v. Connor, supra; see also Gulliver v. Dalsheim, supra; Share v. Iowa, 581 F.2d 727 (8th Cir. 1978).

deemed abandoned. Gorham v. Wainwright, 588 F.2d 178, n.2 (5th Cir. 1979); Galtieri v. Wainwright, 582 F.2d 348, n.8 (5th Cir. 1978); Gardner v. Blackburn, 569 F.2d 856 (5th Cir. 1978); Sneed v. Blackburn, 569 F.2d 854 (5th Cir. 1978); O'Berry v. Wainwright, 546 F.2d 1204 (5th Cir. 1977); Henzel v. Florida, 475 F.2d 1271 (5th Cir. 1973).

Respondent submits that Wainwright v. Sykes, is applicable to the instant case because under state procedural rules, the Petitioner would be precluded from raising the confrontation clause issue on collateral review. See, e.g., Engle v. Isaac, ___U.S.___, 102 S.Ct. 1558, 1570 n.28 (1982). Under Rule 3.850 of the Florida Rules of Criminal Procedure, the Petitioner would be precluded from raising this issue, because it is a matter which could have been raised on direct appeal. Florida courts have consistently held that issues which could have been raised on direct appeal from the conviction will not support a subsequent collateral attak by way of a motion for post-conviction relief. See, e.g., Alvord v. State, 396 So.2d 184, 191 (1981); Adams v. State, 380 So.2d 423, 424 (Fla. 1980); Harvey v. State, 383 So.2d 770, 771 (Fla. 3d DCA 1980). Thus, Respondent submits that because Petitioner's confrontation clause claim is foreclosed from state review due to procedural default, this Court must reverse the district court and dismiss the confrontation

clause claim absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation.

The Respondent further submits that the district court's finding that under Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982), it would have been futile for Petitioner's counsel "to have asserted error in the introduction of a ostensible nonhearsay testimony before a court which approved the prosecutor's reliance upon that testimony as evidence of guilt." (See Report of Magistrate at 10), (R.132-152), was error. Respondent submits that it may not of been futile for petitioner's appellate counsel to have raised the confrontation claim in the state court. Although, the alleged inadmissible evidence was not considered hearsay by the Florida courts at the time of the appeal, see footnote 8, supra, there were Fifth Circuit opinions which contrary to Florida law, held this type of testimony to be hearsay and a violation of the right to confrontation. See text supra at 38. It is not proper for federal courts to speculate as to what the State appellate courts would have done if properly presented with a confrontation issue. See, e.g. Engle v. Isaac, supra, 102 S.Ct. at 157-158 n.35.

Furthermore, district court's reliance on Henry v. Wainwright, supra, is misplaced. In Henry, the Court held that Engles v. Isaac, supra was inapplicable because the Florida courts had dealt with the defendant's claim on the merits, thus there was no procedural default, and that under Florida law it was not necessary for a party to continue to object, where all the parties had agreed that the trial court had overruled the objection and there was no need for counsel to belabor the point. 686 F.2d at 313-314 n.3 and 4. In the instant petition, the Petitioner's confrontation claim was never properly brought to the appellate court's attention. Thus, it is logical to assume that the appellate court may have found error based on the confrontation clause in the introduction of the out-of-court statements, if the claim had been properly brought before it. However, in the form that the allegation of error was made, that is, that the prosecutor improperly commented on evidence not before the jury, the state appellate court's resolution of the issue was proper.

The Respondent asserts that Petitioner has not shown any cause for his failure to raise the confrontation clause issue on his direct appeal to the Third District Court of Appeal. Any allegations that appellate counsel was ineffective for failing to raise the issue on direct appeal

must be rejected as insufficient reasons to satisfy the "cause" requirement. See, e.g., Washington v. Estelle, 648 F.2d 276, 278 (5th Cir. 1981); Lumpkin v. Ricketts, 551 F.2d 680, 683 (5th Cir. 1977). See also Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978)(en banc); Indiviglio v. United States, 612 F.2d 624 (2d Cir. 1979). It is not proper for federal courts to speculate on the possible reasons for a failure to follow procedural rules. Tyler v. Phelps, 643 F.2d 1095, 1100 (5th Cir. 1981). Furthermore, cause for a failure to follow state procedure cannot exist because the error "went to the central issue of guilt or innocence and infected the fairness of the trial itself." Tyler v. Phelps, supra, at 1101 n.9. Plain error cannot substitute for a failure to show cause. Engle v. Isaac, ___U.S.___, 102 S.Ct. 1558, 1575 n.43 (1982). Thus, Respondent submits that the Petitioner having failed to show cause, it is not necessary for this Court to determine if there was actual prejudice.[10] Therefore, the district court erred in considering the merits of the Petitioner's confrontation clause claim as grounds for federal habeas corpus relief. See, e.g. Washington v. Estelle, supra at 278.[11]

[10]Respondent asserts that any error that occurred with the admission of the hearsay testimony was harmless beyond a reasonable doubt. See text infra at 43-45.

[11]It should also be noted that it is not the respondent or the State of Florida's fault that the Petitioner after first filing his petition in 1978, waited until 1982, to refile after the first petition had been dismissed without prejudice.

III.

THE DISTRICT COURT ERRED IN FINDING THAT THE ERROR IN ADMITTING HEARSAY TESTIMONY IN VIOLATION OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

Respondent submits that even if the state trial court committed error in permitting the testimony as to what they did pursuant to information received from the unnamed informant, the error should be deemed harmless beyond a reasonable doubt. Harrington v. California, 395 U.S. 250 (1969).[12]

[12]It should be noted that in Favre v. Henderson, 464 F.2d 359 (5th Cir. 1972), the Fifth Circuit delineated nine factors based on Dutton v. Evans, 400 U.S. 74 (1970), from which the court will review to determine whether the admission of hearsay testimony violated the defendant's Confronation Clause right. 464 F.2d at 364. The Respondent would submit that one important factor - that the out-of-court declarant could not have been subpoenaed by the defense is not present in the instant case. The trial court clearly pointed out the Petitioner had failed to file any motions for disclosure of the confidential informant, (SR.34), nor did the Petitioner move to have the officer produce the informant's name, although the Petitioner's counsel was told by the state that the court could order the officer to do so. (SR.35, 38-39). Thus, the Petitioner could have had the informant produced if he had so requested. This is not a case in which the state introduced an unidentified informant's statement at trial and at the same time used the confidential informant's privilege as a shield from disclosing his name. See, e.g., Styers v. Smith, 501 F.Supp. 880, 887 (W.D.N.Y. 1980).

In McAllister v. Brown, 555 F.2d 1277 (5th Cir. 1977), the Fifth Circuit held that although the testimony of a police officer that an unnamed informant reported that the Petitioner had claimed responsibility for an armed robbery, may have exceeded the outer limit on the use of hearsay evidence, such error was harmless. The only evidence cited by the Court was the identification of the petitioner by the two victims of the armed robbery from a photographic array, at a line-up and in court.

In the instant case, the victim, Wesley Preston, positively identified the Petitioner as his assailant on at least three different occasions. Preston positively identified the Petitioner on the day following the crime from a group of photographs shown to him at the hospital by Detective Shipes. (SR.61, 103-106). Preston again identified the Petitioner as his assailant at a preliminary hearing prior to trial (SR.63), and again at trial. (SR.56, 58). Preston testified that when the Petitioner entered his car, he "watched him pretty close," since he had been stabbed and robbed before. (SR.54, 56), and in fact, he and the Petitioner talked most of the way during the 15-20 minute ride, during which time Preston could observe the Petitioner. (SR.54, 55, 68, 69). Thus, the Respondent submits that any error was harmless, Chapman v. California, 386 U.S. 18 (1967).

CONCLUSION

Based upon the foregoing argument and citations of authority, the Respondent respectfully requests that this Court reverse the order of the district court granting the Petitioner's Petition for Writ of Habeas Corpus.

Respectfully submitted,

JIM SMITH
Attorney General

Penny Hershoff Brill

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF OF RESPONDENT/APPELLANT was furnished by mail to ELLIOT H. SCHERKER, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Fl 33125, on this 19 day of May, 1983.

Penny Hershoff Brill

PENNY HERSHOFF BRILL
Assistant Attorney General

ph/

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-1102

LOUIE L. WAINWRIGHT,

Petitioner,

vs.

MICHAEL HUTCHINS,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, Michael Hutchins, by and through undersigned counsel, moves this Court for leave to proceed in forma pauperis in the above-styled cause, pursuant to Rule 46.1 of this Court. Respondent has been adjudicated indigent and permitted to proceed in forma pauperis by the United States District Court for the Southern District of Florida. The affidavit of the respondent in support of this motion is attached hereto.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

BY: _____
ELLIOT H. SCHERKER
Assistant Public Defender

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-1102

LOUIE L. WAINWRIGHT,

Petitioner,

vs.

MICHAEL HUTCHINS,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, MICHAEL HUTCHINS, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made below relating to my ability to pay the costs of prosecuting the cause are true.

I have been employed as a part-time mechanic for the past five months. My average weekly take-home pay is One Hundred and Thirty Dollars, half of which I give to my mother to assist with the payment of bills.

Prior to obtaining this employment, I had not been employed for the past nine years. I receive no other income from any source. I do not own any cash or checking or savings account. I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Michael Hutchins.
MICHAEL HUTCHINS

Sworn to and subscribed before me
this 30 day of January, 1984.

Sam Katz
NOTARY PUBLIC
State of Florida at Large

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXPIRES OCT 10 1986
BONDED THRU GENERAL INSURANCE UND